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## UNPACKING NEW POLICING: CONFESSIONS OF A FORMER NEIGHBORHOOD DISTRICT ATTORNEY

Alafair S. Burke \*

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\* Associate Professor, Hofstra Law School. B.A., Reed College; J.D., Stanford Law School. I would like to thank Robin Charlow, Nora Demleitner, Peter Spiro, and Robert Weisberg for their helpful comments on previous drafts. I am grateful to Cynthia Leigh, Reference Librarian of the Hofstra Law Library, and Daniel Venditti for their dedicated assistance.

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*Abstract:* This Article attempts to reframe a burgeoning scholarly debate about the appropriateness of neighborhood self-governance as both a means to local crime control and a normatively worthy end in itself. On one side of the existing debate stands an emerging and influential group of “new discretion” scholars, who defend the delegation of discretion to police officers attempting to enforce social norms that are often ambiguous. These scholars argue that the support and involvement of so-called “communities” in such law enforcement efforts can be an adequate substitute for traditional judicial scrutiny of police discretion, particularly the prohibition against vague criminal laws. On the other side of the debate are traditional civil libertarians who view norm-based policing and the theories of self-governance underlying it as thinly disguised forms of majoritarianism.

This Article has two primary goals. One goal is to use the author’s experience as a community-based prosecutor to critique the new discretion scholars’ reliance upon malleable notions of community to determine the legality of police programs. The second goal is to develop a more meaningful distinction among new policing efforts. Specifically, this Article advocates a distinction between civil and criminal initiatives. This approach would retain the existing prohibition against vague criminal laws. However, it would permit cities to implement strategies requiring police discretion, as long as those strategies avoid traditional criminal investigation, prosecution, and punishment. Such an approach would force cities either to adopt nontraditional responses to public safety problems or to be scrutinized under the traditional rules governing criminal law and procedure.

## INTRODUCTION

Community policing is the bandwagon of modern law enforcement<sup>1</sup> and has quickly led to a burgeoning debate regarding the appropriateness of neighborhood self-governance and the enforcement of social norms as local crime control methods. An emerging and influential group of scholars defends the delegation of discretion to police officers attempting to enforce often ambiguous community norms.<sup>2</sup> These scholars argue that at least some forms of community support and involvement in police programs serve as adequate substitutes for traditional judicial scrutiny of police discretion, particularly the

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1. See WESLEY G. SKOGAN & SUSAN M. HARTNETT, *COMMUNITY POLICING, CHICAGO STYLE* at vi (1997) (“The concept [of community policing] is so popular with the public and city councils that scarcely a chief wants his department to be known for failing to climb on this bandwagon.”); Tracey L. Meares, *A Colloquium on Community Policing: Praying for Community Policing*, 90 CAL. L. REV. 1593 (2002) (noting that the term community policing “has become ubiquitous among law-enforcement practitioners and scholars” and collecting sources that use the term).

2. See *infra* Part I.B–C for a discussion of the role of police discretion in the new policing models and a summary of the new discretion scholarship defending that discretion.

prohibition against vague criminal laws. On the other side of the debate are traditionalists who view the new policing and the theories of self-governance underlying it as threats to traditional civil libertarian values protected by well-established constitutional law.<sup>3</sup>

This Article takes an initial step at reframing the debate by attempting to reconcile at least some new policing forms with existing constitutional jurisprudence governing the criminal justice system. The Article has two primary goals. First, the Article critiques the new policing scholarship. Drawing on my own experiences as a “Neighborhood District Attorney” in Portland, Oregon, I argue that the rhetoric of community can be used to disguise similarities between traditional law enforcement models and at least some new policing initiatives. By using the malleable concept of “community” to distinguish the traditional from the new, some new policing advocates would permit cities to avoid the constitutional rules that usually govern law enforcement by dressing up traditional initiatives as “community-oriented.”

A second goal is to develop a more meaningful distinction among new policing programs. Where the current advocates of the new policing attempt to draw lines between programs based on the role of neighborhood governance, this Article advocates a distinction between civil and criminal initiatives. Whether one’s notion of criminal punishment is retributive or utilitarian, traditional criminal law operates by punishing individual offenders for past acts. Much of the new policing, in contrast, involves the implementation of long-term programs that seek to prevent violations of the criminal law through means other than criminal punishment. Distinguishing between programs based upon their “programmatic purpose”<sup>4</sup> would result in increased judicial tolerance for some forms of police discretion, but would do so without eradicating the jurisprudence that appropriately limits discretion in the criminal context.

This Article critiques the new discretion scholarship and develops the alternative “programmatic purpose” model in three sections. Part I

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3. See *infra* notes 193–200 and accompanying text for an overview of the scholarship criticizing the new policing scholarship.

4. I use the term “programmatic purpose” as it is used by the U.S. Supreme Court in its recent “special needs” jurisprudence. See *Ferguson v. City of Charleston*, 532 U.S. 67, 82 (2001) (holding that a public hospital’s drug testing program for pregnant women did not advance a special need because its programmatic purpose was to generate evidence to be used in a criminal prosecution); *City of Indianapolis v. Edmond*, 531 U.S. 32, 45–48 (2000) (holding that the special needs doctrine requires judicial examination of programmatic purpose and striking down a drug interdiction checkpoint because its programmatic purpose was general crime control).

provides an overview of the new policing models and the emerging scholarship defending police discretion. Part II draws upon my own experiences in a community prosecution unit to argue that the new policing models do not warrant an overhaul in the constitutional rules that govern the criminal justice system. While retention of the current regime would limit police discretion in enforcing laws with a punitive purpose, criminal justice jurisprudence would not hinder new policing efforts reflecting a non-punitive programmatic purpose.

Part III fleshes out the programmatic purpose model in more detail. It does so first through example. Portland's Drug Free Zone ordinance enables police to control public spaces in high-crime neighborhoods by excluding targeted individuals from discrete geographic areas. Applying the U.S. Supreme Court's developing jurisprudence on criminal punishment, I argue that this form of neighborhood exclusion is not a criminal sanction because individuals are excluded only temporarily and from a relatively small portion of the city, and are not arrested unless they violate the exclusion order. After concluding that neighborhood exclusion does not necessarily constitute criminal punishment, I turn to an analysis of the U.S. Supreme Court's decision in *City of Chicago v. Morales*<sup>5</sup> and argue that the Court should have determined as a threshold matter whether Chicago's anti-gang loitering ordinance imposed a criminal or civil restraint before holding that it was intolerably vague. Finally, Part III discusses the advantages of the programmatic purpose model over the current new discretion scholarship.

## I. THE NEW POLICING MODELS AND NEW DISCRETION SCHOLARSHIP

To understand what is "new" about the new policing, it is helpful to contrast it with its immediate predecessor. The prevailing model of policing over the past forty years has been dominated by an emphasis on rapid responses to 911 calls and subsequent criminal case creation.<sup>6</sup> Anyone who has seen a few episodes of the television series "Law & Order" is familiar with the traditional role of police in what this Article calls the rapid-response model of policing.<sup>7</sup>

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5. 527 U.S. 41 (1999).

6. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 565-73 (1997) (summarizing the reform era of policing, including its emphasis on responding to citizen calls and making arrests).

7. The long-running television series "Law & Order" commences with the familiar

In rapid-response policing, a crime's occurrence is what triggers the involvement of law enforcement. Once the crime is reported, the criminal justice system seeks to identify, arrest, prosecute, and punish the crime's perpetrator. The rules of criminal procedure, investigatory techniques, and criminal intelligence are means to that end. In pursuit of that common end, each actor within the criminal justice system maintains her own, distinct role. Police get involved after the crime occurs, prosecutors join in only after an arrest is made, and corrections officers play a role only post-conviction.

American cities have increasingly departed from rapid-response policing over the past decade by turning to forms of policing that emphasize an ongoing, proactive role in maintaining order, rather than simply responding to crimes as they occur.<sup>8</sup> Although policy makers commonly describe the new policing trend<sup>9</sup> as "community policing," one purpose of this Article is to question the meaningfulness of community participation in these emerging forms of policing. Accordingly, this Article uses the alternative term of "new policing models."

Looking beyond the rhetoric of "community" is especially important in light of that term's steadily increasing influence on the criminal justice system. The concept of community policing blossomed during the 1990s as the centerpiece of President Clinton's anti-crime efforts.<sup>10</sup>

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announcement: "In the criminal justice system, the people are represented by two separate yet equally important groups: the police who investigate crime and the district attorneys who prosecute the offenders. These are their stories." See, e.g., *Law & Order: 3 Dawg Night* (NBC television broadcast, Nov. 28, 2001).

8. See Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 420 (2000) ("[O]ur policing strategies in the last decade have turned heavily towards prevention of crimes . . . rather than individual events."); Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 377 (2001) (referring to "new policing" as a "large-scale structural trend . . . geared toward fostering norms of order in public spaces"); David Thacher, *Conflicting Values in Community Policing*, 35 LAW & SOC'Y REV. 765, 765 (2001) (stating that community policing "remains the dominant model of police reform today").

9. To some degree, this trend is "new" only when viewed in a relatively narrow historical context. Prior to the emergence of rapid-response policing, the United States experienced an earlier era of law enforcement when police practiced an ongoing order-maintenance function. For a history of modern policing environments, see Livingston, *supra* note 6, at 565-73 (documenting the "reform era" at the turn of the twentieth century, which brought increased professionalism and autonomy to law enforcement) and George L. Kelling & Mark H. Moore, *From Political To Reform To Community: The Evolving Strategy of Police*, in COMMUNITY POLICING: RHETORIC OR REALITY 3-11 (Jack R. Greene & Stephen D. Mastrofski eds., 1988) (noting law enforcement's twentieth century shift away from social welfare work toward a narrow focus on crime control).

10. In his 1994 State of the Union Address, President Clinton vowed to place 100,000

By 1999, a majority of police departments boasted community policing programs, and a fifth of all local police officers in the nation were designated as community policing officers.<sup>11</sup>

The scholarship examining the new policing models assumes that the models are defined by partnerships between law enforcement and community.<sup>12</sup> However, were community policing simply a term to describe increased cooperation between police and residents, there might be little to debate among criminal and constitutional law scholars. At the heart of the new community-oriented crime control efforts lies more than just an increased emphasis on community involvement. Much of the new policing is premised on the claim that neighborhoods should be permitted to establish governing norms of behavior, enforced by the police.<sup>13</sup> In an attempt to enforce social norms in public spaces, cities have enacted or increased the enforcement of ordinances establishing curfews and prohibiting panhandling, public intoxication, public

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community-oriented police officers on America's streets. President William Clinton, State of the Union Address (Jan. 28, 1994), 30 WEEKLY COMP. PRES. DOC. 148, 155–56 (Jan. 31, 1994). Within a year, the Department of Justice created its Office of Community Oriented Policing Services (COPS) to accomplish that goal by expanding community policing and distributing grant funds to support local community policing projects. Ted Gest, *Symposium: Leadership Issues in Criminal Justice Policy: The Evolution of Crime and Politics in America*, 33 MCGEORGE L. REV. 759, 762 (2002) (discussing expansion of local police forces by the COPS program).

11. This change was a quick one. In 1997, only 4% of local police officers were designated community policing officers, and approximately one third of local police departments had full-time officers engaged in community policing activities. In 1999, 21% of all police officers were designated community policing officers, and 64% of local police departments—representing 86% of the nation's population served by local police—had full-time officers working on community policing projects. MATTHEW J. HICKMAN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: COMMUNITY POLICING IN LOCAL POLICE DEPARTMENTS, 1997 & 1999 2 (Feb. 2001, rev. Mar. 2003).

12. See Heymann, *supra* note 8, at 420 (noting that new policing models use the help of those in a neighborhood); Livingston, *supra* note 6, at 575 (noting community policing's emphasis on community involvement); Meares, *supra* note 1, at 1600 (noting that community involvement is one of the "key forces" shaping community policing).

13. See Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 367–77 (1997) (discussing the enforcement of social norms in new policing efforts); Livingston, *supra* note 6, at 578–84 (same); Schragger, *supra* note 8, at 382 (noting that the new policing is based on "a claim that communities— . . . at the level of the neighborhood—not only can but *should* effect basic changes in the fundamental rules that govern relations between the state and the individual, as well as among individuals"); Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253, 1256–58 (2000) (discussing the enforcement of social norms in new policing efforts).

camping, graffiti, unlicensed street vending, and loitering, often in the name of the “community.”<sup>14</sup>

The fascination with the enforcement of community norms is not limited to police departments. Prosecutors’ offices around the country have developed so-called “community prosecution” units, moving prosecutors out of courthouses and into neighborhoods to address public safety concerns directly.<sup>15</sup> Court systems have created specialized community courts to dispose of the many low-level offenses resulting from the increasing criminalization of disorder.<sup>16</sup>

From the new policing has emerged a growing body of legal scholarship questioning whether current constitutional jurisprudence is appropriate for evaluating the constitutionality of the new policing efforts. This Part provides an overview of the new policing approaches and the responding scholarship.

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14. See, e.g., PORTLAND, OR., CITY CODE §§ 14B.20.010–.070 (2002) (creating “drug free zones” from which drug offenders can be excluded); *Roulette v. City of Seattle*, 97 F.3d 300, 302–06 (9th Cir. 1996) (upholding a Seattle ordinance prohibiting sitting or lying on sidewalks); *Loper v. NYPD*, 999 F.2d 699, 701–06 (2d Cir. 1993) (finding unconstitutional an ordinance prohibiting loitering for the purpose of begging); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1562–84 (S.D. Fla. 1992) (enjoining enforcement against the homeless of prohibitions against sleeping and eating in public); see also Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1217–19 (1996) (discussing laws targeting low-level offenses); Helen Hershkoff & Adam S. Cohen, *Begging To Differ: The First Amendment and the Right To Beg*, 104 HARV. L. REV. 896, 896–97 n.1 (1991) (summarizing laws targeting begging); Brian Privor, *Dusk ‘Til Dawn: Children’s Rights and the Effectiveness of Juvenile Curfew Ordinances*, 79 B.U. L. REV. 415 (1999) (discussing juvenile curfews); Schragger, *supra* note 8, at 378 (discussing laws targeting low-level offenses).

15. See generally Barbara Boland, *Community Prosecution: Portland’s Experience*, in COMMUNITY JUSTICE: AN EMERGING FIELD 253–77 (David R. Karp ed., 1998) (discussing community prosecution) [hereinafter Boland (Portland)]; Anthony V. Alfieri, *A Colloquium on Community Policing: Community Prosecutors*, 90 CAL. L. REV. 1465 (2002) (same); Barbara Boland, *What is Community Prosecution?*, NAT’L INST. OF JUST. J., Aug. 1996, at 35 (same) [hereinafter Boland (NIJ)]; Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321 (2002) (same).

16. John J. Ammann, *Addressing Quality of Life Crimes in Our Cities: Criminalization, Community Courts and Community Compassion*, 44 ST. LOUIS U. L.J. 811, 815–19 (2000) (discussing development of community courts to resolve charges for quality of life offenses); Quintin Johnstone, *The Hartford Community Court: An Experiment That Has Succeeded*, 34 CONN. L. REV. 123, 123–24 (2001) (noting the rapid proliferation of community courts nationwide); Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL’Y 63, 63 (2002) (“Specialized ‘community courts’ have burst onto the judicial landscape almost overnight.”) (internal footnote and citation omitted).



### A. *The New Policing*

Although distinctions can—indeed, should—be drawn among various new policing models, a handful of characteristics separate these models from rapid-response policing. First, new policing models tend to address the needs of specific neighborhoods, rather than apply the same general policing approach throughout the department's jurisdiction.<sup>17</sup> For example, police might depart from the traditional rapid-response model by stepping up enforcement against a specific type of crime, such as prostitution, that plagues only one district in the city. A nearby district, however, might suffer more than its fair share of car thefts, requiring a different strategy a few miles away within the same jurisdiction.

Second, as part of this focus on the problems of specific neighborhoods, the new policing models tend to incorporate increased involvement of citizens and enhanced citizen-police partnerships.<sup>18</sup> The rapid-response model looks to citizens as crime reporters and witnesses. While traditional policing methods value citizen assistance in identifying, locating, and prosecuting offenders, they do not look to citizens to shape the priorities of the police department. New policing models, in contrast, tend to look to community "stakeholders,"<sup>19</sup> like neighborhood residents and business owners, to identify the public

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17. See Archon Fung, *Beyond and Below the New Urbanism: Citizen Participation and Responsive Spatial Reconstruction*, 28 B.C. ENVTL. AFF. L. REV. 615, 629 (2001) (discussing variations among community groups in selecting priorities and responsive approaches); Heymann, *supra* note 8, at 421, 423–24 (discussing the concentration of police resources by neighborhoods and "the fact that police are accountable to neighborhoods as well as to cities").

18. See Mark H. Moore, *Problem-Solving and Community Policing*, in 15 CRIME & JUSTICE: A REVIEW OF RESEARCH: MODERN POLICING 99, 126 (1992) (noting that community policing focuses on "cooperation with the community"); Wesley G. Skogan, *Community Organizations and Crime*, in 10 CRIME & JUSTICE: A REVIEW OF RESEARCH 39, 40 (1988) ("The community approach to crime prevention emphasizes collaboration between the criminal justice system and community organizations."); Thacher, *supra* note 8, at 765 (stating that the building of partnerships is one of community policing's "boldest and most difficult aims" and "arguably its core ideal").

19. Of the terms that emerge repeatedly from the jargon that surrounds community justice programs, the term "stakeholder" appears to be a favorite, referring not just to residents but to "practically everyone" who might care about what happens to a neighborhood. See Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 502 (2000) (discussing the role of "stakeholders" in shaping norms under new policing approaches); Joan W. Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions*, 27 HASTINGS CONST. L.Q. 717, 720 (2000) (noting the importance of "stakeholder" agreement in restorative justice programs); Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 410 (2000) (noting that participation of community "stakeholders" legitimizes government action); Thacher, *supra* note 8, at 765 (noting that community policing attempts to incorporate "practically everyone").

safety problems specific to that community and to develop and implement strategies to solve those problems.

A third trend among the new policing models, emphasis on low-level criminal offenses, may follow from the second. Few citizens are troubled on a day-to-day basis by the murder, rape, and major assault cases that police, prosecutors, and courts traditionally prioritize.<sup>20</sup> What bothers them are the street-level drug dealers, prostitutes, drunks, noise makers, and vandals who remind them on a daily basis that their neighborhood is not what they wish it to be. The new policing models tend to address these so-called “quality of life” offenses.<sup>21</sup>

The new policing’s emphasis on low-level offenses stems in part from James Wilson and George Kelling’s influential 1982 essay, “Broken Windows.”<sup>22</sup> The broken windows theory maintains that low-level disorder—such as loitering, public intoxication, and littering—contributes to more serious crime if left uncorrected.<sup>23</sup> Wilson and Kelling suggested that disorder can contribute to overall crime in two separate ways. First, the appearance of disorder can create fear among community residents, who will begin to stay indoors, withdraw from their community, and eventually stop trying to assert control over the neighborhood.<sup>24</sup> Second, low-level crime and disorder may lead directly to an increase in crime by breaking down community standards and signaling to lawbreakers that “no one cares” enough about the community to enforce the law.<sup>25</sup> Under the direct component of the theory, then, disorder is essentially contagious, and one broken window,

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20. See Heymann, *supra* note 8, at 444 (noting that traditional policing prioritized offenses by their severity); Kelling & Moore, *supra* note 9, at 60 (maintaining that the historical prioritization of serious offenses stems from those “who think the enduring social interest in non-intrusive and fair policing can best be served by focusing attention on a few serious and visible crimes”); Livingston, *supra* note 6, at 578 (noting that citizens’ highest law enforcement priorities are low-level disorders such as abandoned buildings, vandalism, gangs, loitering juveniles, and unsafe parks); Thacher, *supra* note 8, at 776 (noting disjoint between traditional police prioritization of serious crimes and community groups’ concern about “soft crime” such as rowdy youths, barking dogs, and physical decay); George L. Kelling, *Policing and Communities: The Quiet Revolution*, PERSP. ON POLICING (Nat’l Inst. of Justice, U.S. Dep’t of Justice, Washington, D.C.), June 1988, at 2 (also noting low-level nature of community concerns).

21. See Livingston, *supra* note 6, at 558–59 (noting the new police focus on “promoting the ‘quality of life’ in public spaces”).

22. James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29–38.

23. *Id.*

24. *Id.* at 32–33.

25. *Id.* at 31.

if left unrepaired, can lead to the rest of the windows being broken. To heighten law-abiding residents' confidence in their neighborhoods and to prevent the progression of disorder, Wilson and Kelling advocated a police function in reducing minor but visible social disorder.<sup>26</sup>

Wilson and Kelling's article has influenced not just criminal justice theory, but also police strategies in the field.<sup>27</sup> For example, based on the broken windows theory, former New York City mayor Rudolph Giuliani employed an aggressive, "zero-tolerance" policing approach, directing officers to increase arrests for such low-level crimes as subway turnstile jumping, public intoxication and urination, jaywalking, unlicensed street vending, and window-squeegeeing.<sup>28</sup> Although critics question the efficacy of the zero-tolerance approach,<sup>29</sup> the notable decrease in New York City's crime rate during the 1990s has been widely attributed to the Giuliani strategy.<sup>30</sup>

Finally, a fourth defining characteristic of the new policing models is the desire to develop programmatic responses to specific problems in order to prevent future occurrences. The rapid-response model's immediate objective is to arrest and punish an individual offender. Through specific and general deterrence, the punishment of that individual offender and others like him might lead to an overall decrease in crime, but the immediate objective is case-creation. In contrast, the

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26. *Id.* at 38.

27. See Livingston, *supra* note 6, at 583–85 (discussing the influence of the broken windows theory on contemporary policing).

28. Judith A. Greene, *Zero Tolerance: A Case Study of Police Policies and Practices in New York City*, 45 CRIME & DELINQUENCY 171, 172 (1999); Thompson, *supra* note 16, at 84; Waldeck, *supra* note 13, at 1275–78.

29. See BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 90–104 (2001) (questioning the efficacy of order-maintenance policing); Greene, *supra* note 28, at 177–81 (suggesting alternative explanations for New York City's crime rate decrease during the 1990s).

30. See, e.g., WILLIAM BRATTON WITH PETER KNOBLER, TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC 152–56 (1998) (discussing New York City's implementation of the broken windows theory); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, The Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 293 (1998) (noting that "it is today practically impossible to find a single scholarly article that takes issue with the quality-of-life initiative"); Kahan, *supra* note 13, at 368–69 (noting the decline in New York City's crime rates and stating that "city officials and at least some criminologists credit the larger reduction in crime rates to [the] emphasis on 'order maintenance'"). But see Jeffrey Fagan et al., *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY 1277, 1322 (1988) (maintaining that "the pattern in New York City is much more consistent with gun-oriented policing than with indiscriminate quality-of-life interventions as a cause of decline").

new policing models incorporate the influential work of Herman Goldstein<sup>31</sup> by treating the prevention of future occurrences as the primary objective.<sup>32</sup> Goldstein called into question the prevailing rapid-response model of policing, where police resources were squandered on chasing down individual suspects after crimes had already occurred.<sup>33</sup> He argued that police would be more effective if they spent more time seeking to prevent or reduce long-term, recurring problems instead of responding to individual crime occurrences.<sup>34</sup> In Goldstein's view, the response should be tailored to the particular problem and should look beyond formal law enforcement methods.<sup>35</sup> Adopting this concept of "problem-oriented" policing, the new policing models attempt to identify the most effective response to a community problem, which may not require increased arrests and prosecutions.<sup>36</sup>

The new policing's emphasis on problem-solving instead of case-creation may very well be inherent in its prioritization of low-level criminal offenses. Rapid-response policing is particularly ill-suited to low-level crimes. Unless a low-level offender is caught red-handed, police are unlikely to identify and locate the offender without expending resources that would outweigh that single offense's importance. Even if a low-level offender is identified and arrested, the criminal justice system is ill-suited to remedy a neighborhood's ongoing problems. Prostitutes, vandals, and the publicly intoxicated serve short sentences or

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31. HERMAN GOLDSTEIN, *PROBLEM-ORIENTED POLICING* (1990) [hereinafter GOLDSTEIN, *PROBLEM-ORIENTED POLICING*]; Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 *CRIME & DELINQUENCY* 236 (1979) [hereinafter Goldstein, *Improving Policing*].

32. See Heymann, *supra* note 8, at 423 (noting Goldstein's role in encouraging police to treat crime prevention as a primary goal, focusing more on general problems than on individual incidents); Livingston, *supra* note 6, at 573–75 (discussing Goldstein's influence on modern policing environments).

33. Goldstein, *Improving Policing*, *supra* note 31, at 245.

34. See generally GOLDSTEIN, *PROBLEM-ORIENTED POLICING*, *supra* note 31, at 32–49, 102–03.

35. See *id.* at 103–04.

36. See Gest, *supra* note 10, at 762 (listing problem-oriented policing as a move away from the rapid-response model); Lawrence Rosenthal, *Policing and Equal Protection*, 21 *YALE L. & POL'Y REV.* 53, 53 (2003) (discussing problem-oriented policing). Of course, new policing methods may result in increased arrests and prosecutions if these are determined to be the most effective response to a community problem. What distinguishes problem-oriented policing from the rapid-response model is its willingness to prevent future crimes without generating additional cases for the criminal justice system. See Livingston, *supra* note 6, at 573–74 (noting that under problem-oriented policing, traditional law enforcement may be "only one method among many" in a response to public safety concerns).

receive probationary sentences, then return to the same corners to provoke the same community complaints.

*B. New Policing and Police Discretion*

The new policing models inevitably require police to exercise discretion. The police may turn to the community to identify law enforcement priorities in community policing, but the community may identify more concerns than the police are able to tackle effectively, requiring police to choose among them. Problem-solving policing<sup>37</sup> calls for discretion in choosing among non-traditional alternatives to reducing systemic problems. Even so-called zero-tolerance policing<sup>38</sup> calls for police discretion; it is inconceivable in a world of limited resources that police fully enforce the penal code in every instance.<sup>39</sup>

The most controversial need for discretion, however, arises from a legislative inability to define with precision the “disorder” that police should seek to eradicate. Although police can reduce disorder indirectly by enforcing non-vague prohibitions against prostitution, littering, graffiti, and vandalism, any broad attempt to criminalize deviations from community norms is bound to be vague. The new policing’s inevitable reliance upon police discretion raises potential conflicts with existing judicial limitations upon such discretion, including the void for vagueness doctrine.

Particularly during the Warren Court years, the U.S. Supreme Court made limiting the exercise of police discretion a primary purpose of constitutional jurisprudence in the criminal arena.<sup>40</sup> As part of this effort, the Court has held that vague criminal laws offend the Fourteenth Amendment’s guarantee of due process. For example, in *Papachristou v. City of Jacksonville*,<sup>41</sup> the Court unanimously held void for vagueness a

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37. See *supra* notes 31–36 and accompanying text for discussion of problem-solving policing.

38. See *supra* notes 28–30 and accompanying text for discussion of the zero-tolerance policing model.

39. See David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response To the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1064 (1999); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1170 (1998) (noting that even under New York City’s aggressive order-maintenance approach, police retain “considerable latitude” about whether, where, and against whom to enforce the law).

40. See Cole, *supra* note 39, at 1060 (“At least since Earl Warren’s tenure as Chief Justice of the U.S. Supreme Court in the 1950s and 1960s, limiting police discretion has been a central focus of constitutional criminal jurisprudence.”); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 255–56 (1968).

41. 405 U.S. 156 (1972).

city ordinance that punished those “strolling around from place to place without any lawful purpose,” not to mention jugglers and men who lived off the earnings of their wives.<sup>42</sup>

Three values have been offered to justify the Court’s constitutional prohibition against vague criminal laws.<sup>43</sup> First, a vague criminal law fails to give notice to the citizenry of the boundary between legal and criminal activity.<sup>44</sup> That this failure of notice is seen as fundamentally unfair suggests, at least implicitly, a value placed on the citizenry’s ability to walk with confidence all the way to the line of criminal conduct without fear of crossing it.<sup>45</sup> Second, vague criminal laws are criticized for permitting police arbitrariness.<sup>46</sup> By allowing police officers to interpret the scope of its prohibition, a vague criminal law entrusts police officers with discretion to decide whom to arrest for a criminal offense. Finally, courts have articulated concerns that vague criminal laws could chill protected activities, such as speech or association.<sup>47</sup> In this respect, the void for vagueness doctrine provides an

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42. *Id.* at 170–71. The ordinance authorized police to arrest:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children[.]

*Id.* at 156–57 n.1. See also *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (striking down as unconstitutionally vague a California statute requiring those found “loiter[ing] or wander[ing] upon the streets or from place to place without apparent reason or business” to provide a “credible and reliable” identification and reason for their presence when requested to do so by a police officer).

43. For a general discussion of the void for vagueness doctrine in criminal cases, see 1 WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 2.3 (1986), and Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

44. *Kolender*, 461 U.S. at 357; *Papachristou*, 405 U.S. at 162; *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (providing that criminal statutes must define the offense with sufficient clarity for an ordinary person to understand what conduct is prohibited).

45. The importance of fair notice underlies other criminal law rules as well. For example, consider the values reflected in the rule of lenity, providing that ambiguities in criminal statutes should be resolved by construing the statute narrowly. The Court has stated that the rule of lenity reflects in part the principle that “a fair warning should be given to the world . . . of what the law intends to do if a certain line is passed” and that “the line should be clear.” *United States v. Bass*, 404 U.S. 336, 347–48 (1971) (internal citations omitted).

46. See *Kolender*, 461 U.S. at 357 (holding that criminal prohibitions must be defined “in a manner that does not encourage arbitrary and discriminatory enforcement”).

47. In *Papachristou*, for example, the Court likened the perceived virtues of “strolling” and

avenue for the judiciary's substantive review of legislative decisionmaking.<sup>48</sup>

The Court's decision in *City of Chicago v. Morales*<sup>49</sup> to strike down Chicago's anti-gang loitering ordinance has raised the question of whether the void for vagueness doctrine creates an unnecessary barrier to new policing methods. Chicago enacted the ordinance in response to pervasive gang activity in its inner-city neighborhoods.<sup>50</sup> In contrast to rapid-response policing, the ordinance attempted to reduce gang control over neighborhoods proactively through problem-solving policing.<sup>51</sup> Rather than direct police officers to arrest offenders for the serious crimes that often result from gang activity, the ordinance authorized police officers to issue verbal orders to disperse if a group of two or more people were loitering in a public place with no apparent purpose, and if the officer reasonably believed that at least one person within the group was a member of a "criminal street gang."<sup>52</sup> Violation of the order to disperse was a misdemeanor offense.<sup>53</sup> A six-member majority of the Court struck down Chicago's anti-gang loitering ordinance as unconstitutionally vague, holding that the Chicago City Council failed to "establish minimal guidelines to govern law enforcement" when it instructed officers to issue dispersal orders to groups loitering with "no apparent purpose."<sup>54</sup> The void for vagueness doctrine prohibited the Chicago City Council from protecting neighborhoods from pervasive gang intimidation by deferring to the "moment-to-moment judgment of the policeman on his beat."<sup>55</sup>

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"loafing" to the values reflected in the writings of Walt Whitman and Henry D. Thoreau, freedoms that have "encouraged lives of high spirits rather than hushed, suffocating silence." 405 U.S. at 163–64.

48. See Ellickson, *supra* note 14, at 1210–11 (noting that the *Papachristou* decision treated the city's attempt to control the use of public spaces as the "suppression of high spirits in favor of drab conformity"); Livingston, *supra* note 6, at 621–27 (discussing the void for vagueness doctrine as substantive, not procedural, review).

49. 527 U.S. 41 (1999).

50. *Id.* at 46–47.

51. See *id.* (summarizing findings of the Chicago City Council). See *supra* notes 31–36 and accompanying text for discussion of problem-solving policing.

52. See *Morales*, 527 U.S. at 47 (summarizing CHI., ILL., MUNICIPAL CODE § 8-4-015 (2002)).

53. *Id.*

54. *Id.* at 60–64 (holding that anti-gang loitering ordinance entrusted too much discretion to police officers to determine which types of loitering "purposes" were lawful) (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

55. *Id.* at 60 (quoting *Kolender*, 461 U.S. at 360).

### C. *The New Discretion Scholarship*

Because the Court relied on the void for vagueness doctrine to strike down one of the first new policing initiatives to reach the Court, the doctrine has become the target of new policing advocates who maintain that police discretion is essential to the enforcement of social norms. Relying heavily on the new policing models, an influential group of scholars has argued that a changed political landscape mitigates the need for judicially-imposed limitations on police discretion. They argue that, where vagrancy laws were once used to marginalize racial minorities, today's police exercise discretion to the benefit of and often at the behest of inner-city communities. Police discretion, the argument further goes, is not only inevitable, but in fact helpful if exercised to enforce social norms in a way that aids normatively-worthy communities. These "new discretion" scholars advocate a two-tiered criminal justice jurisprudence in which the level of judicial scrutiny of police discretion turns on whether the challenged program constitutes new policing.<sup>56</sup>

Debra Livingston, for example, asserts that "quality-of-life" offenses with low-level sanctions should not be reviewed under the void for vagueness doctrine.<sup>57</sup> She argues that "rule-like," specific laws are inevitably imperfect in capturing the disorderly conduct that a community seeks to prohibit and, therefore, police will inevitably exercise discretion in deciding against whom to enforce such ordinances.<sup>58</sup> She argues:

When public order laws do not appear aimed at the exclusion of groups or individuals from participation in a community's public life, but rather at the articulation of reasonable behavioral standards in the interest of preserving public spaces, communities should not be prevented from replacing the *Papachristou* regime with a new legal regime in which more contextualized, conduct-based prohibitions authorize police to perform order maintenance tasks.<sup>59</sup>

When laws are vague, she argues, police discretion can be managed through other means, such as political accountability, community

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56. Cole, *supra* note 39, at 1062 (coining the term "new discretion" scholarship).

57. Livingston, *supra* note 6, at 562; *see also* Ellickson, *supra* note 14, at 1243–46 (advocating informal zoning of public spaces with respect to disorder and advocating discretionary enforcement in the most orderly zones of vagrancy and disorderly conduct laws).

58. Livingston, *supra* note 6, at 618, 647–50.

59. *Id.* at 647.



monitoring, internal enforcement guidelines, and sunset provisions on ordinances that delegate police authority.<sup>60</sup>

Similarly, Dan Kahan and Tracey Meares have argued that “exacting judicial scrutiny of routine policing functions” and judicial “hostility toward discretion”<sup>61</sup> are no longer warranted in contemporary urban crime control.<sup>62</sup> They assert that these components of modern criminal procedure jurisprudence were necessary during the Warren Court years when majority groups used selective enforcement of vague criminal statutes as a critical component of the institutionalized racism that subordinated minority groups.<sup>63</sup> In contrast to its less benevolent predecessor, discretion invoked in the new policing is to the benefit of—and often at the behest of—minority groups in urban communities that are exercising increasing political power.<sup>64</sup> Kahan and Meares argue that the new policing *enhances* liberty in inner-city neighborhoods by altering destructive and constraining norm perceptions, such as the expectation that a young man should carry a gun or join a gang,<sup>65</sup> and by providing a less draconian law enforcement alternative to long prison sentences.<sup>66</sup> They also argue that members of inner-city communities are “practically and morally” in a better position than civil libertarians and judges to strike the proper balance between liberty and order.<sup>67</sup>

Kahan and Meares argue that the modern regime of criminal procedure should be abandoned in favor of a model that considers the emergence of African-American political strength.<sup>68</sup> Specifically, they

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60. *Id.* at 650–70.

61. Kahan & Meares, *supra* note 39, at 1158–59 (noting that two central features of the modern criminal procedure regime are “its authorization of exacting judicial scrutiny of routine policing functions” and “its hostility toward discretion”).

62. *Id.* at 1166–71.

63. *Id.*

64. *Id.* at 1163–64 (noting the support for community policing among African-Americans and maintaining that the “new community policing is an outgrowth” of demand within African-American communities for increased protections of law enforcement).

65. *Id.* at 1168–69, 1181–82; *see also* Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 129 (2000) (arguing that gang influence on “community mores” undermines the inner cities’ chances for revitalization). For further discussion of the reinforcement of social norms to stabilize neighborhoods, *see* Kahan, *supra* note 13, at 367–77, Livingston, *supra* note 6, at 578–84, and Waldeck, *supra* note 13, at 1299–308.

66. Kahan & Meares, *supra* note 39, at 1169; *see also* Rosenthal, *supra* note 36, at 58; Schragger, *supra* note 8, at 441; William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1836–38 (1998).

67. Kahan & Meares, *supra* note 39, at 1177–80.

68. *Id.* at 1171.

advocate a political process theory of criminal procedure jurisprudence, in which courts would defer to the political process and uphold the delegation of discretion to police as long as the burden of the police procedures falls on the average member of the community or those with a “linked fate” to the governing majority.<sup>69</sup> Applying this political process theory, Kahan and Meares would permit some community-oriented programs to avoid not only the prohibition against vague laws, but also other rules limiting police discretion, such as the Fourth Amendment’s general requirement that searches be conducted pursuant to a warrant based on probable cause.<sup>70</sup>

Randall Kennedy shares Kahan and Meares’s belief that traditional liberal concern about the effects of law enforcement on African-American defendants is misplaced in light of the disproportionate effect of crime on African-American victims.<sup>71</sup> Because the African-American community suffers the most from the commission of criminal offenses, he argues, the community’s problem with the criminal law is not its over-enforcement, but its under-enforcement.<sup>72</sup>

Robert Ellickson shares many of the same concerns as Livingston, Kahan, and Meares, but approaches urban quality-of-life problems from a zoning perspective.<sup>73</sup> He argues that communities could be zoned pursuant to their tolerance for disorder.<sup>74</sup> In the most orderly zones, prohibitions against panhandling and loitering would be enforced, thereby relegating such activity to the less orderly zones.<sup>75</sup> Like Livingston, Kahan, and Meares, Ellickson criticizes judicial

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69. *Id.* at 1171–75.

70. *Id.*

71. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 19 (1997).

72. *Id.*; see also Rosenthal, *supra* note 65, at 130 (emphasizing the need for enhanced policing as part of inner-city revitalization). Like Kahan and Meares, Kennedy believes that victimization by crime is now a larger burden on the everyday lives of African-Americans than the mistreatment of suspects and criminal defendants. KENNEDY, *supra* note 71, at 19. Although Kennedy shares Kahan and Meares’s belief that African-Americans benefit from enforcement of criminal law, he does not share their view on one of the first new policing efforts to be reviewed by the U.S. Supreme Court. While Kahan and Meares worked to support Chicago’s gang loitering ordinance, invalidated as vague in *Morales*, Kennedy co-authored an amicus brief opposing the ordinance. See Brief of Amici Curiae Chi. Alliance for Neighborhood Safety et al. in Support of Respondents, *City of Chicago v. Morales*, 527 U.S. 41 (1999) (No. 97-1121); see also Cole, *supra* note 39, at 1069 & n.59 (observing that while Kennedy has not directly assailed the vagueness doctrine, Kahan and Meares have relied critically on his claim that black communities need more, not less, law enforcement).

73. Ellickson, *supra* note 14, at 1219–46.

74. *Id.* at 1219–26.

75. *Id.* at 1221–22.

decisionmaking during the late 1960s and early 1970s, including the void for vagueness doctrine, to the extent that the Court “seemed blind to the fact that their constitutional rulings might adversely affect the quality of urban life and the viability of city centers.”<sup>76</sup> He maintains that federal courts should refrain from restricting the authority of state and local legislative bodies to craft laws responding to local conditions.<sup>77</sup>

Mark Rosen emphasizes geographic boundaries from a different perspective, arguing for increased judicial tolerance of self-governance through the creation of geographic nonuniformity of constitutional requirements.<sup>78</sup> In Rosen’s view, courts should apply the void for vagueness doctrine contextually for at least some communities. For example, he maintains that the *Morales* Court, instead of pondering the possibility that the anti-gang loitering ordinance would be applied to innocent people waiting for a taxi or resting from a jog, could have inquired whether the ordinance “was sufficiently definite to persons living in a city thick with street gangs.”<sup>79</sup>

Underlying the new discretion scholars’ willingness to relax constitutional doctrines that they perceive to be barriers to new policing is their shared belief that community groups support and play an integral part in the new policing models. Kahan and Meares, for example, emphasize the popularity of the new policing efforts within inner-city communities and argue that the support of racial minorities demonstrates an even-handed application of the police initiatives.<sup>80</sup> Livingston similarly relies on community support when she defends many of the public order laws at the heart of the new policing models by observing that they do not aim to exclude outsiders from “participation in a community’s public life.”<sup>81</sup>

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76. *Id.* at 1213.

77. *Id.* at 1213–14.

78. Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1166–82 (1999).

79. *Id.* at 1174.

80. Kahan & Meares, *supra* note 39, at 1160–66; *see also* Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859, 1863–65 (1999) (noting that government can gain legitimacy by working in partnership with private organizations respected within the community). Although Kennedy has not challenged the vagueness doctrine, he appears to share some of Kahan and Meares’s views about the desire of African-Americans for increased police protection. *See* KENNEDY, *supra* note 71, at 19 (arguing that African-Americans desire more, not less, enforcement of criminal laws); *see also* Rosenthal, *supra* note 36, at 56 (arguing that traditional law enforcement leaves the poor and vulnerable subject to a higher risk of crime than the wealthy and powerful).

81. Livingston, *supra* note 6, at 647.

New discretion scholars assume not only community support, but also community involvement in the new policing.<sup>82</sup> Livingston, for example, argues that internal police regulations and community monitoring of the police department can be more effective checks on police discretion than the void for vagueness doctrine.<sup>83</sup> Similarly, Sarah Waldeck emphasizes the importance of “partnerships” between police and community as an effective method of ensuring that police do not hide attempts to increase felony arrests beneath the cover of enforcing community norms.<sup>84</sup>

## II. CRITIQUING THE NEW DISCRETION SCHOLARSHIP

New discretion scholars have brought a much-needed shift to criminal law scholarship. Whereas criminal law scholars have traditionally criticized the impact of judicial decisionmaking on offenders, the new discretion scholars are concerned also about the consequences to victimized inner-city residents.<sup>85</sup> They recognize that the traditional hostility of inner-city residents toward police arises not just from police aggression toward their community, but also from the manifestation among law enforcement of low expectations about the quality of life in poor neighborhoods and increased tolerance for illegal activity against minority residents.<sup>86</sup> The new discretion scholars rightly enlarge the

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82. See generally Randolph M. Grinc, “Angels in Marble”: *Problems in Stimulating Community Involvement in Community Policing*, 40 CRIME & DELINQUENCY 437, 440–42 (1994) (discussing why community participation is thought to be important in the new policing models). Grinc notes that law enforcement seeks the participation of the community to enhance the community’s perception that police are responding to its concerns, to increase the community’s sense of safety, to improve community-police relations, and to decrease crime. *Id.* at 440–41. Grinc also observes that most theorists stress the importance of community involvement even though they disagree about why it is important. *Id.* at 440.

83. Livingston, *supra* note 6, at 659–67 (discussing internal regulation and civilian monitoring of police discretion); see also Heymann, *supra* note 8, at 454–55 (maintaining that officer discretion that is unlikely to be monitored judicially should be governed by departmental regulations).

84. Waldeck, *supra* note 13, at 1301. For example, Waldeck praises the Day Labor Project in Glendale, California, where police work with activists, businesses, and social service providers to create a central site for day laborers as an alternative to quality-of-life policing in a neighborhood affected by the gathering of day laborers. *Id.* at 1302–04. Similarly, she discusses partnerships between police and schools to combat truancy and juvenile crime. *Id.* at 1304–06.

85. As William Stuntz has recently noted, “everyone does and should care about both” police overreaching and victimization by private parties, because “the state of nature—a world free of all risks of police coercion—is an unhappy place in many of the same ways that a police state is an unhappy place.” William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2146 (2002) (arguing that the scope of constitutional rights does and should change in response to broad crime trends).

86. This view dates back to one of the earliest attempts to understand the relationship between

concept of liberty beyond traditional civil libertarian notions to include a basic sense of safety that privileged Americans take for granted. In doing so, they recognize that a model government does more than simply refrain from interference with the citizenry; it plays a role in guaranteeing its safety.

Unfortunately, the new discretion scholarship reflects its concern for real-world quality of life by concluding that community involvement in law enforcement obviates the need for traditional constitutional limitations upon police. That conclusion is flawed in several respects. First, it gives constitutional significance to notions of community that are often idealized and easily manipulated. Second, it assumes that a community's support for and participation in a challenged police initiative can be quantified accurately and will not fluctuate significantly over time. A third flaw is the new discretion scholarship's emphasis upon majority rule, which would deprive political minorities of substantive judicial review of rights determinations resulting from the political process. A fourth flaw is the failure to respect the values served by traditional vagueness review. Finally, the reliance upon community support as a substitute for the void for vagueness doctrine would create a potentially limitless tolerance for police discretion. The remainder of this Part discusses each of those flaws in turn.

#### *A. Idealizing Notions of "Community"*

New discretion scholars' reliance on malleable notions of community support and involvement to justify radical jurisprudential paradigm shifts is troubling for several reasons. As a threshold matter, it is not obvious that residents of a geographically-defined region comprise a "community" in anything other than the most superficial sense.<sup>87</sup> Granted, in inner-city neighborhoods, one's address shares a high correlation with one's income and skin color,<sup>88</sup> and at least some of the

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police and minority communities. See, e.g., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 161–62 (1968). The commission, popularly known as the Kerner Commission, was established after the 1967 summer riots to study factors that contributed to the riots and to suggest means of preventing reoccurrences. *Id.* at 1. The commission concluded that the riots commenced in part because of antagonism between police and inner-city neighborhoods, attributable not only to aggressive police tactics within those neighborhoods, but also to police apathy about crimes *against* those neighborhoods. *Id.* at 157–62; see also Livingston, *supra* note 6, at 571 (discussing Kerner Commission).

87. See *infra* Part II.E for further discussion regarding the difficulty of defining communities.

88. Richard Ford, for example, has explained how the continuing correlation between race and income contributes to the maintenance of "racially identified spaces." See Richard Thompson Ford,

new discretion scholarship relies upon the notion of a meaningful community among African-Americans.<sup>89</sup> Nevertheless, to assume the existence of an identifiable community view within inner-city neighborhoods is to ignore both the presence of other racial groups and recent immigrants in those neighborhoods and the tensions that can exist between them and African-Americans.<sup>90</sup> It also ignores the reality that there is diversity of opinion among African-Americans regarding crime, police, and competing policy priorities.<sup>91</sup>

Some new discretion scholars would argue that, even in the absence of a community consensus, it is inner-city residents' improved opportunity to participate fairly in the political process that is critical in the new policing efforts.<sup>92</sup> Although representative forms of government undoubtedly play a role in determining the "will" of the community, a political process account of constitutional rules ignores the reality that every community, however defined, has its outsiders "whose complaints are least likely to be heard by the rest of the community."<sup>93</sup>

Moreover, even if there were something resembling an empirically identifiable consensus within a meaningfully defined community, it is

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*The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843, 1849–57 (1994).

89. Specifically, Tracey Meares has been especially effective in describing a "linked fate" among African-Americans. See *infra* note 176 and accompanying text.

90. See generally John O. Calmore, *Race/Isn Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1110 & n.240 (1998) (discussing integration and segregation patterns of recent Asian and Latino immigrants and the tensions that can exist between racial groups); Eric K. Yamamoto, *The Color Fault Lines: Asian American Justice from 2000*, 8 ASIAN L.J. 153, 158 (2001) (discussing "color on color" conflicts).

91. See Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1770 (1992) (noting a division among African-Americans regarding whether the criminal justice system works too well or not well enough); Cole, *supra* note 39, at 1085 (noting that "inner-city communities, like all communities, do not speak with one voice"); Grinc, *supra* note 82, at 457–60 (noting heterogeneous populations and intragroup conflicts within the "communities" targeted by community policing projects); Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 689 (1998) (noting diversity within minority groups); see also JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 254 (1993) (noting that communities are rare if defined as having "a commonality of interests, traditions, identities, values, and expectations").

92. Kahan and Meares, for example, do not appear to require a true consensus among residents to pass muster under their political process approach; approval by elected representatives is sufficient. See Kahan & Meares, *supra* note 39, at 1175 (noting that, although individual residents in a public housing project might not have approved of a search policy, they had the opportunity to participate in the political process, and their elected officials had expressed support for the policy).

93. Cole, *supra* note 39, at 1083 (noting that "every 'community' will have its misfits, dissidents, and outsiders").

less than clear that new policing efforts actually identify that consensus. Community policing efforts, for example, frequently look to neighborhood organizations for support and partnerships. However, the limited empirical research about community organizations indicates that these groups reflect only a small proportion of residents and tend to be dominated by homeowners and white residents in racially-mixed neighborhoods.<sup>94</sup>

Indeed, one of the few empirical studies of community participation in community policing projects found nearly universal difficulties stimulating and continuing citizen participation in community policing projects, even though the projects were markedly different in their approaches.<sup>95</sup> Studying eight early pilot community policing projects, Randolph Grinc reported that “ordinary” residents within the areas affected by the pilot programs usually had either no knowledge at all of the programs or a vague idea that there was a new government program operating in their neighborhoods.<sup>96</sup> Many tended to see the programs as opportunities for neighborhood picnics and other social gatherings.<sup>97</sup> Even among leaders of neighborhood groups, who demonstrated the highest level of knowledge about the programs, few appeared to understand fully the role of the community in the programs.<sup>98</sup> Importantly, Grinc reported that only a “small core group of residents” was involved in the programs.<sup>99</sup>

When only a small percentage of residents participate in “partnerships” with police, there is no guarantee that these squeaky

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94. See, e.g., Michael E. Buerger, *A Tale of Two Targets: Limitations of Community Anticrime Actions*, in *COMMUNITY JUSTICE: AN EMERGING FIELD*, *supra* note 15, at 137–38 (noting that membership in community crime-prevention groups is often low and tends to be dominated by homeowners and by white residents in racially diverse neighborhoods); Skogan, *supra* note 18, at 68 (concluding that community organization is more likely to occur in “homogeneous, better-off areas of cities”).

95. See Grinc, *supra* note 82, at 442–64 (surveying data from eight pilot Innovative Neighborhood-Oriented Policing programs funded by the Bureau of Justice Assistance).

96. *Id.* at 442–44.

97. *Id.* at 444.

98. *Id.* at 456.

99. *Id.* at 445. Grinc noted shared hurdles to police partnerships with community across the programs. In addition to the community’s lack of understanding about the programs, Grinc noted problems presented by preexisting hostilities between police and the members of poor and minority communities now being asked to participate, residents’ fear of retaliation by neighborhood gangs and drug-dealers, community distrust created by previous, short-lived, failed experiments in their neighborhoods, police frustration with what they perceive as apathy within the community, and diverse interests and infighting within the community. *Id.* at 446–60.

wheels represent the will of the broader community. They may very well be a vocal minority that happens to share law enforcement's priorities. The following anecdote demonstrates the risks of placing too much emphasis on the *perception* of community sentiment. From 1997 to 1999, I served as a member of the Multnomah County District Attorney's Neighborhood District Attorney program, a nationally-recognized program in Portland, Oregon, at the forefront of "community prosecution."<sup>100</sup> Although listening to community groups was a major component of our agenda, we were not above massaging public perception of the community. For example, "Richard" was an African-American retiree who could be counted on to vocalize a predictably pro-police stance at critical city council hearings and other decisionmaking sessions. Preparing for such meetings always involved a phone call to Richard to ensure his participation. We respected Richard for his views and his activism, but we appreciated the political reality that his voice would go further with a city council struggling to gauge the desires of inner-city residents than the voices of white liberals opposing police measures.

It is not surprising, therefore, that the term "community" has been called "imprecise"<sup>101</sup> and potentially "idealized."<sup>102</sup> The political popularity of community-oriented programs already provides a convenient rhetoric<sup>103</sup> that could potentially mask aggressive police initiatives that run counter to the concept at the heart of true community policing—improved relations between the police and the rest of the community. A suburban police chief once confided in me that he was willing to go along with some forms of community policing in light of its popularity and the availability of grant funding for community-

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100. See Thompson, *supra* note 15, at 365 n.171 (touting Portland's Neighborhood District Attorney program as one of three "excellent community prosecution efforts that have benefited from self-reflection, and from evaluation and adjustment"); see also Boland (Portland), *supra* note 15, at 253–77 (discussing Portland's Neighborhood District Attorney program); Boland (NIJ), *supra* note 15, at 35–40 (same).

101. JEROME E. MCELROY ET AL., COMMUNITY POLICING: THE CPOP IN NEW YORK 3–4 (1993).

102. Livingston, *supra* note 6, at 577.

103. Academics have warned "that a bewildering and sometimes inappropriate variety of police initiatives could well be implemented in community policing's name." Livingston, *supra* note 6, at 578 (collecting cites); see also *Law and Disorder: Is Effective Law Enforcement Inconsistent with Good Police-Community Relations?*, 28 FORDHAM URB. L.J. 363, 366 (2000) (comments of Paul Chevigny) ("So-called community policing that does not mean participation by the people isn't really community policing."); Robert Weisberg, *Foreword: A New Agenda for Criminal Procedure*, 2 BUFF. CRIM. L. REV. 367, 370 (1999) (noting that a "somewhat sentimental notion of 'community' norms masks a dangerously majoritarian anti-Constitutionalism").



oriented programs,<sup>104</sup> but that his version of community policing simply meant that “we police the community.”

The problem opposing an initiative labeled as community-oriented, of course, is, as Professor Schragger has stated, “No one can be against community.”<sup>105</sup> George W. Bush, for example, has come under fire for proposing drastic cuts to the budget of the office of Community Oriented Policing Services (COPS), the federal program developed under President Clinton to promote community-oriented policing.<sup>106</sup> Rather than terminate the program entirely, Bush’s 2004 request retains the program in name only with a proposal to reduce spending from \$1.4 billion in 2003 to \$164 million in 2004.<sup>107</sup> Even before the budget-cut proposal, the administration had shifted the focus of the program toward the provision of technological assistance to local police departments and placing officers in public schools, nevertheless retaining the community-oriented label.<sup>108</sup> In light of the current potential for the community policing trend to amount at least in some programs to politically popular rhetoric,<sup>109</sup> scholars should be reluctant to permit constitutional principles to turn on the supposed involvement and support of the “community.”

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104. The availability of federal grant money for projects considered to be community-based provides an incentive for cities to engage in creative labeling of programs. Heymann notes that Chicago and New York City adopted markedly different approaches, but both call them “community policing,” a label that Heymann notes is often required in order to obtain federal grant money that is ultimately used to increase the number of officers within the department. Heymann, *supra* note 8, at 422.

105. Schragger, *supra* note 8, at 403.

106. OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2004 app. at 643 (Apr. 8, 2003), available at <http://www.whitehouse.gov/omb/budget/fy2004/pdf/appendix.pdf>.

107. See Herbert Lowe, *NY Dems Say U.S. Cuts May Cost City 2,000 Cops; Ending Hiring Program Is Wrong in Era of Threats, Trio Argues*, *NEWSDAY*, June 10, 2002, at A13.

108. See Gest, *supra* note 10, at 762 (discussing the direction of COPS under the Bush administration).

109. Professors Alschuler and Schulhofer have warned about the need “to be on guard against the appealing but highly manipulable rhetoric of ‘community,’ a rhetoric that is increasingly prevalent in contemporary discourse.” Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 216 (1998); see also *supra* notes 100–08 and accompanying text (discussing potential of community rhetoric to mask more traditional, and even aggressive, forms of policing).

*B. Determining Constitutional Parameters by Community Sentiment*

Even if there were general consensuses within communities about policing efforts, and even if those consensuses were accurately measured, a second problem with the new discretion scholarship is its assumption that communities should be permitted to determine their own minimum protections from government intrusion. There are two problems with this assumption. First, it can be difficult to determine whether the articulated consensus of the community truly reflects the desires of the residents. Second, even if a community's true desire is to submit to a particular police practice as an alternative to systemic neighborhood crime problems, the Constitution should provide minimum protections that cannot be waived by the political process.

*1. Assessing Community Support for the New Policing*

As an initial matter, claims that inner-city communities favor the new policing models should be viewed cautiously, especially in light of the limited alternatives for which those communities may feasibly opt.<sup>110</sup> Programs seemingly supported by an inner-city community may very well be viewed by the community as the lesser of policy evils in a world where politically feasible alternatives are limited by the broader majority.<sup>111</sup> Kahan and Meares, for example, observe that African-Americans favor order-maintenance policing because it is *less* harmful than other forms of law enforcement, such as long prison sentences for drug offenders.<sup>112</sup> Even if their claim is empirically correct, inner-city communities do *not*—even with the increased political power that Kahan and Meares attribute to them—have the ability to shape the governance of their communities as they might truly see fit.

Rather, their options—at least those that are realistically obtainable—are limited by the broader majority whose values shape the quality of public schools, banks' lending policies, the availability of job training,

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110. Some have questioned the support for new policing models in inner-city communities, even as a choice among limited and unfavorable options. See Alschuler & Schulhofer, *supra* note 109, at 217–20.

111. Of course, even if the new discretion scholars are correct in their assertion that African-Americans are better represented in the political process than they were a few decades ago, they still remain a minority in the vast majority of political districts.

112. Kahan & Meares, *supra* note 39, at 1165. Cole has criticized Kahan and Meares for failing to provide any empirical support for their assertion that African-Americans favor order-maintenance policing. See Cole, *supra* note 39, at 1085 & n.142.

and the general economic composition of inner-city neighborhoods. The new policing models might give the community increased participation within the narrow sphere of law enforcement, where discretionary responses to low-level disorder might be preferred over draconian responses to more serious offenses. However, the community's *true* desire might be the less realistic alternative of diverting money from law enforcement in order to improve educational and job opportunities.<sup>113</sup>

Moreover, by the time a public safety concept emerges as a concrete policy proposal, it can be difficult to determine whether individual community groups played a critical role in the development of the proposal. Consider, for example, Chicago's anti-gang loitering ordinance. Although inner-city residents may have been responsible for identifying the mitigation of gang activity as a city priority, it is at best unclear whether the community actually gave birth to the anti-gang loitering ordinance as a response to their concerns. Alschuler and Schulhofer maintain that the ordinance was drafted by a white alderman with cooperation from a predominantly white neighborhood association and the city's attorneys.<sup>114</sup> Kahan and Meares, on the other hand, maintain that minority residents not only provided the impetus for the ordinance, but also played a critical role in drafting it.<sup>115</sup> In short, it is unclear whether residents viewed the anti-gang loitering ordinance as an ideal solution or whether they supported it only after it was drafted as an alternative to crime in their neighborhoods.<sup>116</sup>

As a community prosecutor, I played my role several times in the familiar process of proposing a new initiative. Generally, residents would identify their problems, then community police and prosecutors would devise a potential solution, using the community's complaints about the status quo as political support for the proposal. Invariably, residents would prefer something else, usually expensive, infeasible solutions like deterrence through round-the-clock police presence. Community support for the only proposed alternative to a crime-ridden

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113. See Cole, *supra* note 39, at 1088 (observing that inner-city residents might prefer expensive alternatives that the larger community is unwilling to pay for); Erik G. Luna, *The Models of Criminal Procedure*, 2 BUFF. CRIM. L. REV. 389, 453 (1999) (maintaining that "[i]nner-city minorities have opted for discretionary policing techniques not on the merits but because society at large refuses to provide adequate resources to safeguard urban communities").

114. Alschuler & Schulhofer, *supra* note 109, at 217-18 (describing the evolution of the Chicago ordinance).

115. Tracey L. Meares & Dan M. Kahan, *Black, White and Gray: A Reply to Alschuler and Schulhofer*, 1998 U. CHI. LEGAL F. 245, 246-51 (1998).

116. *Id.*

neighborhood does not necessarily amount either to full community support or to full community participation in the decisionmaking process.

Furthermore, it is less than obvious that residents fully understand what they are getting when they sign on to support police programs. For example, African-American communities might support curfews and anti-gang loitering ordinances, believing that these laws provide a method to intervene in their youths' criminality before it becomes more serious.<sup>117</sup> However, because few lay people are well-versed in the often counter-intuitive parameters of criminal procedure, residents may not understand that enforcement of low-level criminal prohibitions against quality of life offenses can lead to the very type of traditional law enforcement that they disfavor. Increased police-citizen interactions on the street lead to more frisks,<sup>118</sup> which may reveal drugs or weapons that trigger lengthy prison sentences. Similarly, a custodial arrest, even for the most trivial offense, triggers the broad power to search incident to arrest.<sup>119</sup> Finally, even if a low-level misdemeanor arrest does not lead to prosecution for a more serious offense, rampant arrests and convictions within a community are stigmatizing<sup>120</sup> and can undermine the community's long-term relationship with police.<sup>121</sup>

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117. Kahan & Meares, *supra* note 39, at 1169.

118. See *Terry v. Ohio*, 392 U.S. 1, 21–27 (1968) (authorizing police to stop individuals based on reasonable suspicion that criminal activity has occurred or is afoot and to frisk stopped individuals for weapons based on reasonable suspicion that the person is armed and presently dangerous).

119. The lawful custodial arrest of an individual authorizes police to search the person and any area within her immediate control. See *Chimel v. California*, 395 U.S. 752, 768 (1969) (delineating the spatial scope of the search incident to arrest exception to the probable cause and warrant requirements of the Fourth Amendment). When an individual is arrested from a vehicle, the vehicle's passenger compartment is considered within the arrested individual's immediate control and therefore can be searched pursuant to the search incident to arrest power. See *New York v. Belton*, 453 U.S. 454, 460 (1981) (providing a bright-line rule that the passenger compartment of a vehicle falls within the scope of a search incident to arrest of one of the vehicle's passengers). The search incident to arrest authority applies even if the police cannot articulate probable cause, or even reasonable suspicion, to believe that the arrested person is carrying a weapon, contraband, or items of evidentiary value. See *United States v. Robinson*, 414 U.S. 218, 235 (1973) (holding that the search incident to arrest power applies automatically upon arrest). Moreover, police can initiate custodial arrests for the most minor criminal offenses, even those that do not trigger a potential sentence of imprisonment upon conviction. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (holding that custodial arrest for failure to use a seatbelt did not violate the Fourth Amendment).

120. Critics of order-maintenance policing have argued that widespread enforcement of low-level prohibitions stigmatizes those targeted by the crackdown on disorder, who are frequently minorities. Accordingly, the policing efforts may contribute to stereotypes of criminality within the communities affected by order-maintenance policing and may hinder attempts to establish non-

Moreover, community sentiment can be molded. As a Neighborhood District Attorney in Portland, I frequently “sold” proposed programs to both the communities who would be subject to them and the police officers who would implement them. It was not unusual to use different talking points for the two audiences.<sup>122</sup> For example, selling the enforcement of a local curfew ordinance to community groups would generally entail an emphasis on protecting children. It was better for a minor to be removed from the streets by police, we said, than by a dangerous predator. We also emphasized the strong likelihood that police would contact the juvenile’s parents to retrieve their child from the police department before the child would be transported to the juvenile detention center. Seeking the community’s support in advance was critical, in our view, not so much to shape the end-product substantively, but for strategic purposes. Community cooperation legitimized the ultimate proposal and could prevent a political confrontation down the road with interested parties who felt excluded from the decisionmaking process.<sup>123</sup>

Selling police officers on the concept of curfew enforcement entailed a strikingly different rhetoric. Rather than emphasizing the benefits that inured to children, we stressed the ability of police to use their discretion to take custody of a child at night based merely upon the child’s presence in a public place.<sup>124</sup> To police, curfew enforcement was an

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criminal social norms. See, e.g., HARCOURT, *supra* note 29, at 166–79; Fagan & Davies, *supra* note 19, at 497–500.

121. David Cole makes a similar point. He argues that constitutional doctrines that permit police to exercise their discretion along race and class lines undermine the legitimacy of law enforcement among minorities and the poor, and reinforce distrust of and opposition to police and the laws they enforce. Cole, *supra* note 39, at 1091.

122. Thacher recognizes the disparity in values between the police and community groups, but sees order-maintenance policing as providing a “unifying metaphor.” See Thacher, *supra* note 8, at 778–79. In Thacher’s view, the broken windows theory bridges the gap between traditional police priorities and the community’s values by linking the targeting of low-level offenses to the police’s underlying goal of reducing serious crime. *Id.* This is not the same, however, as the police sharing the community’s values themselves. Enforcing misdemeanor laws as a means of revealing more serious crimes is different than caring about the misdemeanor violations in their own right.

123. See Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUSTICE: A REVIEW OF RESEARCH 235, 246 (2000) (attributing popularity of community policing in part to the “politics of legitimacy”).

124. Others have noted the traditional law enforcement priorities that make it possible to “sell” the new policing models to police officers by emphasizing the potential to discover more serious crimes. Thacher, for example, reports that many officers support order-maintenance policing because offenders stopped for minor offenses might turn out to have drugs, illegal weapons, or outstanding warrants. Thacher, *supra* note 8, at 778–80 (noting that the broken windows metaphor

opportunity to search and seize local youths whom police continually suspected of residential burglaries and drug crimes, even if the police lacked probable cause to do so.<sup>125</sup> Because the message behind the new policing programs can be spun as necessary to garner support, communities may support new policing programs without fully understanding every aspect of them, including their larger implications under current Fourth Amendment jurisprudence.<sup>126</sup>

### 2. *Permitting Communities To Waive Constitutional Protections*

Perhaps more importantly, even if the majority of citizens truly desire to subject themselves to intrusive government programs to protect their security, the federal Constitution should provide at least some limitation on their ability to bind the entire citizenry through the political process.<sup>127</sup> The aftermath of September 11 demonstrates the difficulties of preserving the value of abstract constitutional liberties in the face of immediate fears about individual and collective security. In the first months following the attacks on the World Trade Center and Pentagon, public sentiment was high that individual rights should defer to the government's war on terrorism; however, as time passes, the public's concern about civil liberties has increased, even as the country remains concerned about "homeland security."<sup>128</sup> Although judicial scrutiny of

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is used to "win over an entire organization to a concern for disorder").

125. The role that pretextual stops and arrests play in order-maintenance policing cannot be overlooked. The U.S. Supreme Court has made clear that a seizure or search is lawful as long as there is an objective basis to support it, even though the individual police officer initiating the seizure or search used that objective basis as a pretext to mask a subjective purpose for which he lacked lawful justification. *Whren v. United States*, 517 U.S. 806, 812–19 (1996). As lawmakers authorize police to arrest for offenses further attenuated from immediate harms, there is an increased likelihood that police will invoke this authority to justify a search of the person on the chance that they will discover evidence of a more serious offense.

126. For a more thorough discussion of the "value conflicts" between police and the groups and individuals with whom they "partner" in community policing enterprises, see Thacher, *supra* note 8, at 766–71. I raise that issue here for the more limited purpose of establishing that the community and police may support a particular program for different reasons, and that the program may not always serve the community's values to the extent that the community is led to believe.

127. Luna, *supra* note 113, at 452 (criticizing Kahan and Meares's political process model for turning individual rights over to the political majority).

128. For example, in January 2002, three months after the attacks in Manhattan and at the Pentagon, 47% of Americans said that the government should take steps to prevent terrorism, even if those steps required violations of basic civil liberties. Joan Biskupic, *Attention Turns Back to Liberty*, USA TODAY, Nov. 1, 2002, at 17A (summarizing data from USA Today/CNN/Gallup polling conducted in January and September of 2002). By September 2002, only one-third of Americans expressed that view. *Id.*

government action can take into account the extent of the need for the action,<sup>129</sup> the governing constitutional first principles should not depend on the public's current perception of the need to place security over traditional concepts of individual liberty.<sup>130</sup>

In that context, consider Kahan and Meares's argument that inner-city residents' support for the new policing measures "reflects their judgment that in *today's* political and social context, the continued victimization of minorities at hands of criminals poses a much more significant threat to the well-being of minorities than does the risk of arbitrary mistreatment at the hands of the police."<sup>131</sup> To advocate that the judiciary defer to that judgment is no different than arguing, post-September 11, for judicial deference to the broader majority's desire to place homeland security over civil liberties.

Just as many Americans have been willing to exchange civil liberties for a chance at increased security, at least some inner-city communities have been long willing to make that same trade at the neighborhood level. As Maya Angelou has said about the day that is thought to have changed the way Americans think about their security,<sup>132</sup> "Living in a

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129. Current constitutional jurisprudence makes room for the judiciary to evaluate the need for the challenged government conduct. For example, the warrant requirement of the Fourth Amendment does not apply if the police act under exigent circumstances presented by the risk of destruction of evidence, the escape of a suspect, or danger to the public. *See* *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298–99 (1967) (holding that police were entitled to enter the suspect's home without a warrant because they entered in hot pursuit of the fleeing suspect). Moreover, several rule-based exceptions to the probable cause and warrant requirements are grounded in the legitimate needs of law enforcement. *See* *United States v. Robinson*, 414 U.S. 218, 234–35 (1973) (grounding the search incident to arrest power upon the exigencies that apply in an arrest situation); *Terry v. Ohio*, 392 U.S. 1, 21–27 (1968) (approving minimally intrusive stops and frisks based on mere reasonable suspicion in light of the needs of patrol officers on the street); *Carroll v. United States*, 267 U.S. 132, 154–56 (1925) (permitting searches of automobiles based on probable cause but without a warrant in light of the need to prevent the automobile from leaving the scene before the search is conducted). The Court's "special needs" doctrine also leaves room to consider the need for warrantless searches. *See infra* note 354 and accompanying text for an overview of the special needs doctrine.

130. William Stuntz, however, has argued that the scope of constitutional rights should be—and is—responsive to changes in the public's prioritization of crime concerns, and he has suggested ways in which the events of September 11 may affect criminal procedural rules. *See* Stuntz, *supra* note 85, at 2144–90. However, Stuntz appears to refer to the law reflecting broad social changes, not the particular desires of an individual neighborhood or even short-lived changes in the priorities of the collective citizenry. *See, e.g., id.* at 2155–57 (discussing the tendency of courts to be influenced by large social trends over time and suggesting that September 11, even though only a one-day salient event, may influence judicial decisionmaking because of its indication of an ongoing threat).

131. Kahan & Meares, *supra* note 39, at 1166.

132. September 11, 2001, is widely seen as the first day since Pearl Harbor that Americans felt

state of terror was new to many white people in America, but black people have been living in a state of terror in this country for more than 400 years.”<sup>133</sup> In light of the widespread desire after September 11 to set aside civil liberties so that we can all “feel safe again,”<sup>134</sup> it should come as no surprise that African-American communities in inner-city neighborhoods—“terrorized” regularly by random street robberies, drive-by shootings, and drug- and gang-related violence—were willing to make that compromise long ago. If the new discretion scholarship entrusts African-American communities to strike that compromise through local political processes, it presumably would permit the broader majority to set aside traditional liberties in favor of homeland security.

### C. *Political Process: An Inadequate Safeguard*

Another flaw in the new discretion scholarship is its reliance on the political process to ensure constitutional rights. Although African-Americans have more political power and representation than they did during the Warren Court years, they still do not have the same representation as white voters.<sup>135</sup> Indeed, the disproportionate representation of African-Americans at every phase of the criminal justice process indicates that the increased political power of African-Americans has not been sufficient to eradicate the adverse impact of law enforcement on African-American communities.<sup>136</sup>

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vulnerable. See, e.g., Kenneth Chang & Andrew Pollack, *On Many Fronts, Experts Plan for the Unthinkable: Biowarfare*, N.Y. TIMES, Oct. 23, 2001, at F1 (stating that it was not until September 11 that “it collectively occurred to Americans how vulnerable they were”); Julia Keller, *The Doctor—As in Kissinger—Is Still In*, CHI. TRIB., Oct. 19, 2001, at C1 (quoting Henry Kissinger as stating that September 11 brought “a change in the consciousness of people” because “the sense of vulnerability is now a fact” instead of “something you never used to think about”).

133. Gary Younge, *No Surrender*, THE GUARDIAN, May 25, 2002, at 16 (quoting Maya Angelou); see also Robert T. Starks, *The Black Man Speaks of Terror*, N’DIGO 8 (Nov. 1–7, 2001) (lamenting the suppression of African-American voices in discussions related to September 11 and noting the terror known by African-Americans).

134. Biskupic, *supra* note 128, at 17A (“Rattled by the Sept. 11 terrorist attacks, Americans rallied around the flag and accepted the idea that the government needed to take extraordinary measures to make people feel safe again.”); David Winston, *It’s a Show of Strength, Not a Political Ploy*, THE WASH. POST, Sept. 22, 2002, at B1 (noting that, in light of September 11, Americans support military action against Iraq because “[t]hey want to feel safe again”).

135. Cole, *supra* note 39, at 1080–81. Moreover, because of Kahan and Meares’s emphasis on the black-white dichotomy, it is unclear how their model would apply to neighborhoods with significant percentages of recent immigrants, who do not have the kind of political power that Kahan and Meares ascribe to African-Americans.

136. For a powerful critique of the new discretion scholars for failing to consider the adverse



Moreover, even if one were confident that African-Americans had adequate access to and opportunities within the political process, the new discretion scholarship incorrectly assumes that the only role of constitutional law in the criminal justice system is to ensure that police practices apply across the governed equally. Some constitutional guarantees protect the individual only comparatively, but others protect citizens absolutely. This contrast is most familiar in the context of the Fourteenth Amendment, where the equal protection clause is concerned only with disparities in a state's treatment of similarly situated individuals, whereas the due process clause provides certain absolute protections to the individual from the state.<sup>137</sup>

A similar distinction can be drawn between constitutional rights afforded to criminal suspects. Some rights of criminal procedure are only comparative. For example, a state need not provide any appeal at all to criminal defendants; if, however, a state does create appellate procedures, it cannot arbitrarily deny those procedures to indigents while affording them to the affluent.<sup>138</sup> "The question is not one of absolutes, but one of degrees."<sup>139</sup>

However, most rights of criminal procedure are absolute, not merely comparative. States could not, for example, evenhandedly prohibit all suspects from having counsel during custodial interrogation, because the Fifth Amendment's right to counsel is absolute, not comparative.<sup>140</sup> Similarly, in drafting the Fourth Amendment, the Framers did not create "a novel 'evenhandedness' requirement;"<sup>141</sup> rather, they generally limited the government's ability to engage in searches and seizures

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impact of law enforcement on African-Americans, see Cole, *supra* note 39, at 1074–79.

137. See, e.g., *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) ("'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.").

138. *Id.* at 606–07. Applying that rule, the Court has held that an indigent defendant has a right to appointed counsel for any first appeal of right created by the state, but does not have such a right for discretionary appeals. *Id.* at 616–18 (refusing to extend right to counsel on first appeals of right to discretionary appeals); *Douglas v. California*, 372 U.S. 353, 355 (1963) (holding that states must provide counsel to indigents for first appeals of right).

139. *Ross*, 417 U.S. at 612.

140. *Miranda v. Arizona*, 384 U.S. 436, 471–73 (1966) (holding that states cannot use statements obtained during custodial interrogation unless defendant is first advised of and waives the right to remain silent and to have counsel present).

141. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 670 (1995) (O'Connor, J., dissenting).

absent probable cause and a warrant.<sup>142</sup> If the only purpose of the Fourth Amendment were to invalidate discriminatory searches and seizures, then communities could vote to allow suspicionless home searches to find evidence of criminal activity, as long as the police searched *all* homes and not just *some*.<sup>143</sup> Although a political process approach is useful in applying comparative rights,<sup>144</sup> the separate rules of criminal procedure do more than protect against discrimination. In short, if the political process were sufficient to constrain governmental conduct, courts would not regularly interpret the federal Constitution to limit governmental conduct.

#### D. *The Virtues of Vagueness Review*

Another flaw in the new discretion scholarship is its seeming indifference to the virtue of notice protected by the void for vagueness

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142. For example, one of the few areas of Fourth Amendment jurisprudence where the evenhandedness of a search can substitute for the usual requirement of probable cause is the “special needs” doctrine, where a search advances some governmental concern other than ordinary law enforcement. See *infra* note 354 and accompanying text for an overview of the special needs doctrine. Even in that limited context, the notion that government intrusions are acceptable as long as they are not discriminatory has faced resistance. See *Vernonia*, 515 U.S. at 668–76 (O’Connor, J., dissenting) (criticizing majority’s reliance upon evenhandedness in upholding random drug-testing of school athletes, where the Court found a “special need” justifying a departure from the usual probable cause and warrant requirements); *Delaware v. Prouse*, 440 U.S. 648, 664 (1979) (Rehnquist, J., dissenting) (dissenting from majority’s holding that police officer’s discretionary stop of driver was unlawful and suggestion of nondiscretionary roadblocks as a solution, and noting that the majority had “elevate[d] the adage ‘misery loves company’ to a novel role in Fourth Amendment jurisprudence”).

143. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 45–47 (2000) (striking down drug interdiction checkpoint, even though it was administered evenhandedly, because it did not fall within the “special needs” exception to usual Fourth Amendment requirements); *Vernonia*, 515 U.S. at 673 (O’Connor, J., dissenting) (noting that, despite the majority’s emphasis on evenhandedness in the special needs context for suspicionless searches, “it remains the law that the police cannot, say, subject to drug testing every person entering or leaving a certain drug-ridden neighborhood in order to find evidence of crime”).

144. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 88–101 (1980). Professor Ely’s political process theory, founded largely upon Justice Stone’s famous footnote in *Carolene Products*, calls for the protection of procedural rather than substantive rights in order to avoid the judiciary’s imposition of its own value judgments on society. See Luna, *supra* note 113, at 443 (discussing Ely’s theory); see also Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 812 (1999) (describing Kahan and Meares’s theory as “neo-political process theory of criminal procedure”). According to Professor Ely, the Court should remain uninvolved, in Fourteenth Amendment terms, unless and until (1) the powerful impede access to the “channels of political change” or (2) laws are enacted that systematically disadvantage a discrete and insular minority. ELY, *supra*, at 103; Luna, *supra* note 113, at 443–44.

doctrine. Vague laws do not provide notice of what should be a clear boundary between criminal and non-criminal activity. By requiring substantive criminal law to be specific, the void for vagueness doctrine attempts to ensure that citizens do not offend criminal prohibitions without at least the *ability* to know in advance the scope of the criminal law.<sup>145</sup> Requiring criminal laws to be specific also limits law enforcement's ability to interpret vague laws in a manner to justify the arrest of anyone police might arbitrarily identify.<sup>146</sup>

The new discretion scholars dispute the virtues of the void for vagueness doctrine by emphasizing the discretion that police retain even when they enforce specific laws. For example, Livingston notes that legislators forced to articulate specific standards tend to articulate rule-based prohibitions rather than standard-based norms.<sup>147</sup> Rules attempt to articulate prohibited conduct with particularity, while standards articulate the policies and goals underlying the law.<sup>148</sup> Livingston notes that because rule-based prohibitions are imperfect reflections of the underlying standard, they can be both overbroad and underbroad.<sup>149</sup> As an example, Livingston cites laws that attempt to curtail youths from automobile "cruising" by prohibiting driving past a traffic control point

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145. See *supra* Part I.B for a discussion of the void for vagueness doctrine. Of course, criminal law does not require actual knowledge by an individual defendant that his conduct violated the law; it requires only that criminal laws provide fair notice to individuals about their scope. Compare *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (providing that criminal laws must require notice), with *Lambert v. California*, 355 U.S. 225, 228 (1957) (stating the general rule that "ignorance of the law will not excuse") (internal quotations and citation omitted). Rather than contradict one another, these two well-accepted criminal law principles work hand in hand. Because criminal laws are required to be "definite and knowable," one can argue that there is no true reasonable ignorance of the criminal law. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 165–66 (3d ed. 2001) (discussing mistake of law claims); see also *United States v. Baker*, 807 F.2d 427, 430 (5th Cir. 1986) (stating that "a defendant could be convicted without any knowledge whatsoever of the law making his conduct criminal").

146. See *supra* Part I.B (discussing anti-vagueness doctrine's role in limiting arbitrary police discretion).

147. Livingston, *supra* note 6, at 610–18.

148. See generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (offering an economic analysis to the question of whether laws should be promulgated as rules or as standards); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992) (describing "the rules and standards debate in a nutshell"). Sullivan summarizes the debate succinctly. "A [law] is standard-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation." Sullivan, *supra*, at 58. "A [law] is rule-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts." *Id.* For example, a posted speed limit is a rule, while a prohibition against careless driving is a standard.

149. Livingston, *supra* note 6, at 614.

in a designated area during specified night hours or more than a specified number of times within a fixed period.<sup>150</sup> While such laws effectively limit police discretion by specifically defining the prohibited conduct, the statutes' reach is not limited to those against whom enforcement of the legislation was intended.<sup>151</sup> When such laws are *overbroad*, Livingston argues, police will use their discretion to decide *not* to enforce it.<sup>152</sup>

Similarly, Kahan and Meares maintain that judicial invalidation of vague ordinances actually forces communities to tolerate police strategies that involve even more discretion. They point out, for example, that Chicago could substitute its gang-loitering efforts with New York City's zero-tolerance approach, where public order laws are specifically defined, but where police officers retain wide discretion about where, when, and whether to enforce them.<sup>153</sup> The void for vagueness doctrine places no restraint, they note, on this type of discretion.<sup>154</sup>

In other words, the new discretion scholars equate officers' discretion to choose whom to arrest among those who are arrestable under a specific law with the discretion to decide who is arrestable under a vague law. Such a comparison overlooks a critical distinction between the discretion to be lenient and the discretion to sanction. When criminal laws are specific, police undoubtedly retain discretion to *reduce* criminal liability by opting *not* to enforce the law where it applies. This form of police discretion is similar to the discretion that other participants in the criminal justice system exercise. For example, prosecutors have discretion not to file the most serious criminal charges that might apply to a given defendant and to pursue a less serious charge instead or not to file any charges at all, but they do not have the discretion to file a charge for which there is no probable cause.<sup>155</sup> Similarly, upon conviction,

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150. *Id.* at 616.

151. *Id.* at 616–18.

152. *Id.*

153. Kahan & Meares, *supra* note 39, at 1170.

154. *Id.*; see also Heymann, *supra* note 8, at 442–43 (noting that the denial of discretion is “a fiction” because police exercise discretion in determining whether to enforce criminal laws); Livingston, *supra* note 6, at 615 (noting that police officers can enforce specifically defined prohibitions in discriminatory ways).

155. See, e.g., Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 21–24 (1998) (discussing broad authority granted to prosecutors in their charging decisions); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 *J. CRIM. L. & CRIMINOLOGY* 717, 743–50 (1996) (same).

judges exercise discretion to sentence the defendant within the applicable sentencing range, but do not have the discretion to go beyond the maximum sentence.<sup>156</sup> To permit vague criminal laws, in contrast, would permit not just police but also prosecutors and judges to select whom to punish because a non-specific law could be interpreted at any stage in the criminal justice system to encompass the entire population.

The distinction between discretion to sanction and discretion to show leniency is a meaningful one, despite its formality. Whereas the former creates the potential to sweep unwitting actors within the scope of a criminal law defined vaguely, the latter involves discretion only over those who step first across the criminal law's clearly defined borders. The importance of this difference can be seen in the U.S. Supreme Court's recent sentencing jurisprudence. The Court has held that while a trial court judge can determine sentencing factors by a preponderance of the evidence, the elements of the substantive criminal offense must be pled in the indictment and proven to the jury beyond a reasonable doubt.<sup>157</sup>

In *Apprendi v. New Jersey*,<sup>158</sup> the Court held that any fact, other than perhaps recidivism,<sup>159</sup> that increases what would otherwise be the applicable maximum sentence must be treated as an element of the offense and be proven to the jury beyond a reasonable doubt.<sup>160</sup> In

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156. *Apprendi v. New Jersey*, 530 U.S. 466, 481–83 (2000).

157. *See id.* at 474–97. *Apprendi* and its progeny are based on the longstanding rule that due process requires the prosecution to prove each element of a criminal offense beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 361–64 (1970). Prior to *Apprendi*, the Court had suggested that state legislatures could avoid *Winship* by labeling relevant factors as sentencing factors rather than as elements of the offense. *See Almendarez-Torres v. United States*, 523 U.S. 224, 228–47 (1998) (upholding federal unlawful reentry statute, under which the maximum sentence increased if the judge found that the defendant's prior deportation was for an aggravated felony, because this recidivism finding was a sentencing factor and not an element of the offense); *McMillan v. Pennsylvania*, 477 U.S. 79, 84–93 (1986) (upholding statute specifying a mandatory minimum sentence if the trial judge found by a preponderance of the evidence that the defendant "visibly possessed a firearm" during the offense, because the factor was not an element of the offense under *Winship*). After an initial hint that *Winship* was not so easily avoided, *see Jones v. United States*, 526 U.S. 227, 243 (1999), the Court in *Apprendi* held that the government must plead and prove to the jury beyond a reasonable doubt any factor that increases what would otherwise be the applicable maximum sentence. *Apprendi*, 530 U.S. at 490.

158. 530 U.S. 466 (2000).

159. The Court left open the possibility that the legislature could assign factual findings regarding recidivism to be determined by the trial court by a preponderance of the evidence, rather than by the jury by proof beyond a reasonable doubt. *Id.* at 496. This qualification permitted the Court to reconcile its holding with *Almendarez-Torres*. *Id.*; *see Almendarez-Torres*, 523 U.S. at 228–47 (holding that recidivism was a sentencing factor, not an element of the offense).

160. *Apprendi*, 530 U.S. at 490.

contrast, as long as the fact does not result in a sentence beyond the maximum penalty provided for the offense of conviction, the legislature can specify the fact as a sentencing factor to be determined by the trial court by a mere preponderance of the evidence.<sup>161</sup> The *Apprendi* regime has been criticized for creating “a meaningless and formalistic difference.”<sup>162</sup> For example, while *Apprendi* prohibits using a so-called “sentencing factor” to increase the defendant’s sentence beyond the otherwise applicable statutory maximum, it permits the legislature to establish a very high statutory maximum—triggered by the jury’s finding of guilt on the substantive offense—and then to establish “sentencing factors” that govern the judge’s determination of the actual sentence beneath the statutory maximum.<sup>163</sup> This criticism echoes the new discretion scholars’ sentiment about the distinction between vague and specific laws: that legislatures can avoid the void for vagueness doctrine and yet continue to vest discretion in police by establishing clear, broadly defined prohibitions, and then permitting the police to exercise discretion in determining when, where, and against whom to enforce the law.

Although the distinction between authority to be lenient and authority to sanction is a formalistic one, recognizing the distinction preserves the important virtue of notice to the citizenry about potential criminal penalties. As Justice Scalia has written in the sentencing context, it is “not unfair to tell a prospective felon that if he commits his

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161. *Harris v. United States*, 536 U.S. 545, 556–69 (2002) (upholding against an *Apprendi* challenge a statute specifying a mandatory minimum sentence that was shorter than the maximum allowable sentence and triggered by a trial court’s finding by a preponderance of the evidence that the defendant brandished a firearm); *McMillan*, 477 U.S. at 89–91 (upholding statute specifying a mandatory minimum sentence if the trial judge found by a preponderance of the evidence that the defendant “visibly possessed a firearm” during the offense).

162. *Apprendi*, 530 U.S. at 541 (O’Connor, J., dissenting) (stating that the Constitution should not “require a state legislature to follow such a meaningless and formalistic difference in drafting its criminal statutes”); see *Harris*, 536 U.S. at 569 (Breyer, J., concurring) (concurring in Court’s holding that *Apprendi* does not apply to mandatory minimums, but stating that he “cannot easily distinguish” the statute struck down in *Apprendi* from a mandatory minimum sentencing statute and “cannot agree with the plurality’s opinion insofar as it finds such a distinction”).

163. Justice O’Connor has demonstrated the ease with which legislatures can avoid *Apprendi* problems. For example, in *Apprendi*, the Court held that New Jersey could not extend the maximum sentence of a felony from ten years to twenty based on a judicial finding that the defendant was motivated to intimidate the victim based on race. 530 U.S. at 494–97. However, as Justice O’Connor points out, New Jersey could cure its sentencing scheme by establishing twenty years as the maximum sentence for the underlying felony and then using the defendant’s motivation as a sentencing factor to establish the actual sentence imposed within the theoretical sentencing range. *Id.* at 540 (O’Connor, J., dissenting).

contemplated crime he is exposing himself to a jail sentence of 30 years—and that if, upon conviction, he gets anything less than that he may thank the mercy of a tenderhearted judge.”<sup>164</sup> Although such a regime might lead to disparities, “the criminal will never get *more* punishment than he bargained for when he did the crime.”<sup>165</sup>

Notice of substantive criminal prohibitions is even more important than notice of the applicable potential penalties. Just as the *Apprendi* doctrine requires legislatures to be clear when defining factors that affect the extent of liability, the void for vagueness doctrine requires legislatures to be clear when defining the underlying substantive criminal prohibitions. And just as *Apprendi* can be avoided by inflating maximum sentences, anti-vagueness prohibitions can be avoided by defining substantive prohibitions broadly but clearly.<sup>166</sup> However, a legislature that avoids either *Apprendi* or the void for vagueness doctrine by manipulating the doctrines’ formalities is more accountable politically than an unrestricted legislature. For example, if legislators avoid *Apprendi* by inflating all statutory maximum sentences beyond reason, it is more likely that they will be held accountable politically than if inflated sentences are imposed only at the courtroom level.<sup>167</sup> Similarly, if the legislature avoids the void for vagueness doctrine by clearly but overbroadly defining the scope of substantive criminal prohibitions, their decision to do so at least has the potential to trigger political debate.<sup>168</sup> In contrast, permitting vague criminal laws invites little political oversight because members of the citizenry will tend to

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164. *Id.* at 498 (Scalia, J., concurring) (noting that defendant similarly “may thank the mercy of a tenderhearted parole commission if he is let out inordinately early, or the mercy of a tenderhearted governor if his sentence is commuted”).

165. *Id.*

166. See *supra* notes 147–54 and accompanying text for a discussion of the new discretion scholars’ perspective that police continue to exercise discretion even when legislatures avoid the anti-vagueness doctrine.

167. Justice Stevens, in defending the majority’s opinion in *Apprendi*, noted that “structural democratic constraints exist to discourage legislatures” from exposing all defendants convicted of any given offense “to a maximum sentence exceeding that which is, in the legislature’s judgment, generally proportional to the crime.” *Apprendi*, 530 U.S. at 490 n.16. From this perspective, the *Apprendi* doctrine enhances transparency by requiring politically accountable legislatures to expose their sentencing priorities through statutory maximum sentences. “So exposed, ‘[t]he political check on potentially harsh legislative action is then more likely to operate.’” *Id.* at 491 n.16 (quoting *Patterson v. New York*, 432 U.S. 197, 228–29 n.13 (1977) (Powell, J., dissenting)).

168. Professor Sunstein has made the point before that invalidation of vague criminal laws can enhance democracy by forcing legislatures to be clear. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 25 (1996).

read vague criminal laws as applying only to what they think of as criminal behavior, and therefore, as *not* applying to them or to people like them.<sup>169</sup> Consider, for example, the considerable political debate that surrounds proposed laws to prohibit smoking in public places. Those laws are controversial because they clearly criminalize conduct that many citizens consider to be innocent. If, in contrast, the proposals were worded as prohibitions against “offensive” conduct, smokers might be unlikely to read the proposed ban as applying to them, at least until the statute was actually enforced in a way that was considered objectionable. By equating the discretion *not* to enforce specific laws with the discretion to choose whom to punish under a vague law, the new discretion scholars undervalue the role that political oversight can play as a check on legislative decisionmaking, even as they tout the power of the political process.

#### *E. Elasticity of the New Discretion Alternatives*

Finally, in addition to the theoretical problems posed by the new discretion scholarship, the alternative decisionmaking models suggested by the new discretion scholars provide little predictive value in application. Although some new discretion scholars concede that application of their proposed alternatives “could result in legitimate differences of opinion at the margins,”<sup>170</sup> the reality is that the models can be manipulated to justify upholding just about any police conduct.

One problem in applying the new discretion scholarship is in defining the relevant community, the starting point to determining whether the “community” has burdened itself evenhandedly. Richard Schragger has discussed the tendency of the new policing models to use the term “community” in a way that masks contradictory notions of what

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169. Like the void for vagueness doctrine, the well-established rule of lenity reflects the importance of legislative accountability. By mandating strict construction of ambiguous criminal statutes, the rule of lenity attempts to ensure that legislatures, not the judiciary, define criminal prohibitions. See *United States v. Bass*, 404 U.S. 336, 348 (1971) (explaining important functions served by the rule of lenity). Kahan has observed that the rule in practice departs from its theory. He argues that courts have been “sporadic and unpredictable” in the application of lenity principles out of recognition that legislatures operate more effectively if permitted to delegate lawmaking at the interstices to the judiciary. See Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 346–54.

170. See Livingston, *supra* note 6, at 647 (acknowledging that it may be difficult to determine whether a law is targeted at “outsiders,” but stating that other constitutional standards require similar judgments).



community means.<sup>171</sup> He summarizes three accounts of community: contractarian, deep, and dualist.<sup>172</sup> Under a “contractarian” account, a community is defined by its members’ agreement to join the community.<sup>173</sup> Chess clubs and housing associations are communities from this perspective because members can withdraw from the group if they disagree. A “deep” account of community suggests that community identity is imposed, not chosen.<sup>174</sup> On this account, community inures from a sense of connectivity and reciprocity inherent in human social relationships.<sup>175</sup> Meares, for example, discusses a sense of “linked fate” shared among all humanity, but particularly by African-Americans, whose life circumstances have been shaped historically by race.<sup>176</sup> Finally, Schragger develops a “dualist” model of community that emphasizes both the intentionality and connectivity of group identity. This account of community emphasizes not *who* is involved in a decision, but the *quality* of the decisionmaking process. Under the dualist model, community involves grassroots participation by individuals in small, local settings, where decisions are the results not of a fair majority vote, but of “true conversations” where each “stakeholder” is heard.<sup>177</sup>

The new policing models, in contrast, tend to emphasize geographic boundaries when defining community,<sup>178</sup> an identity that may not correlate with any meaningful sense of “community.”<sup>179</sup> Because of exit

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171. Schragger, *supra* note 8, at 387–403.

172. *Id.*

173. *Id.* at 387–93.

174. *Id.* at 393–97.

175. *Id.*

176. As Meares explains the concept of “linked fate,” it has two aspects: one that exists generally among all humanity, and one that describes African-Americans specifically. All people have a bond with family and friends and tend to consider the effect of government policies upon them in formulating their own policy positions. African-Americans, however, share this empathy even with African-Americans who are strangers, because their life circumstances have been shaped historically by race. Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 215–17 (1998) (discussing the concept of a “linked fate” among African-Americans); Meares, *supra* note 91, at 682–83 (same).

177. Schragger, *supra* note 8, at 398–403.

178. Todd R. Clear & David R. Karp, *The Community Justice Movement*, in COMMUNITY JUSTICE: AN EMERGING FIELD, *supra* note 15, at 3, 15 (noting that community justice approaches conceptualize community boundaries by neighborhood); Heymann, *supra* note 8, at 421 (discussing the new policing approach of concentrating police resources by neighborhood). *See generally* Rosen, *supra* note 78, at 1166–82 (advocating geographic variations in constitutional requirements).

179. *See* Schragger, *supra* note 8, at 403–16 (warning that the rhetoric of community can be used to reinforce geographic and spatial boundaries); *see also* MCELROY, *supra* note 101, at 3–4

costs, residence within an inner-city neighborhood does not indicate a social contract. Spatially-defined neighborhoods also do not seem to meet a deep account of community. Although residence might be a proxy for race and socioeconomic status, a deep account of community suggests that *some* neighborhood residents would not share a sufficient connection to the “community” to speak on its behalf.<sup>180</sup> From this perspective, spatial attempts to define community fail to explain which “communities” trigger social attachments worthy of moral deference, and which do not.<sup>181</sup> Similarly, geographic boundaries are inconsistent with a dualist notion of community because there is no guarantee that an initiative favored by a spatially-defined neighborhood is the result of a process in which neighbors spoke to each other locally and openly.

Moreover, even if one accepts the notion of defining the relevant “community” by residents’ addresses, the new discretion scholars have not articulated a standard to determine the size of the relevant community. By manipulating the geographic boundaries of the relevant “community,” one can determine whether police action is seen as burdening the community as a whole or only targeted outsiders.<sup>182</sup> Consider, for example, Kahan and Meares’s political process theory. Kahan and Meares maintain that a Chicago Housing Authority policy authorizing suspicionless searches of units in a public housing project would pass muster under their political process theory because representatives of the housing project tenants supported the policy and

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(“Virtually all commentators agree that the concept of ‘community’ as used in the rhetoric of community policing is imprecise . . . and largely uninformed by a century of sociological usage and study.”); Carl B. Klockars, *The Rhetoric of Community Policing*, in COMMUNITY POLICING: RHETORIC OR REALITY, *supra* note 9, at 239, 247–50 (noting that genuine communities are rare).

180. Schragger, for example, notes that a white inner-city shopowner losing business because of minority youths loitering outside would lack a normative claim for redress. *See* Schragger, *supra* note 8, at 433.

181. Rosen, for example, suggests that new policing could be accommodated by creating geographic nonuniformities in constitutional law, but recognizes that minimal constitutional safeguards would be imperiled if the “wrong communities” were evaluated with constitutional nonuniformities. *See* Rosen, *supra* note 78, at 1193. However, Rosen does not attempt to articulate which communities are the “right” ones. He suggests that nonuniformity should be permitted only for “those communities whose existence or creation is not otherwise incompatible with a well-ordered liberal society,” but ultimately concludes that the question of which communities warrant nonuniformity is an “important and relevant” one that “must await another day.” *Id.* at 1193–94.

182. *See* Kahan & Meares, *supra* note 39, at 1171–75 (maintaining that courts should defer to the political process as long as the burden of challenged police procedures falls upon average members of the community or those who share a “linked fate”); Livingston, *supra* note 6, at 647 (arguing that vague public order laws should be tolerated if they “do not appear aimed at the exclusion of groups or individuals from participation in a *community’s* public life”) (emphasis added).

because the burden of the searches fell “on everyone who lived in the projects.”<sup>183</sup> Although they concede that some project residents undoubtedly disapproved of the search policy, they argue that courts should not second-guess the policy because any dissenting tenants had the opportunity to participate in the political process, the majority had the dissenters’ interests in mind, and the majority agreed to subject themselves to the searches as well.<sup>184</sup>

However, the nature of the “representation” of the public housing authority tenants in Chicago was unusual and uniquely local in that tenants were permitted to select representatives *from their housing development* to act on a Local Advisory Council. Typically, however, representation takes a less specific form, and housing project tenants would be seen as “represented” by the person elected from the district containing the affected housing project. When one defines the community more broadly as the entire neighborhood, residents of the housing projects are among the least powerful in a broader community that contains businesses, homeowners, and private landlords and tenants. Seen from this perspective, a public housing search policy does not burden average members of the community at all; rather, support for the policy by the “community’s” elected officials could be seen as the majority singling out a powerless minority for intrusive searches for law enforcement purposes.

A second problem in applying Kahan and Meares’s political process theory is in determining whether the community is burdening itself evenhandedly. Kahan and Meares would uphold not only those police practices that apply to all residents of a community equally, but also those that apply to only a subsegment of the population, as long as the targeted minority is not “despised.”<sup>185</sup> This particular aspect of their theory appears especially difficult in application. For example, Kahan and Meares maintain that juvenile curfews and gang-loitering provisions would pass their political process theory because inner-city teenagers and gang members “are linked to the majority by strong social and familial ties.”<sup>186</sup> In Kahan and Meares’s view, inner-city communities

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183. Kahan & Meares, *supra* note 39, at 1175.

184. *Id.*

185. *See id.* (arguing that curfews and gang loitering laws would pass the political process test, “albeit in a less straightforward fashion” than laws that burden the entire community); *see also* Livingston, *supra* note 6, at 647 (arguing that courts should tolerate vagueness in public order laws if they do not exclude outsiders “from participation in a community’s public life”).

186. Kahan & Meares, *supra* note 39, at 1175.

support public order laws “precisely because they care so deeply about the welfare” of at-risk youths and share a “linked fate” with them.<sup>187</sup>

However, this argument presumes not only that a majority of inner-city residents support such laws, but also that the majority shares a specific subjective motivation for that support. As an initial matter, Kahan and Meares cite no clear empirical support for their claim.<sup>188</sup> Moreover, it is unclear how courts can determine whether participants in the political process are subjectively motivated by feelings of a “linked fate” or good old-fashioned animus. Even if African-Americans feel a sense of empathy toward other African-Americans generally,<sup>189</sup> they may nevertheless disfavor a minority within that larger group.<sup>190</sup> Kahan and Meares’s argument suggests that whenever African-Americans support police conduct, courts should defer to the political process as long as the people affected by the conduct are African-American. As Professor Cole has noted, this approach should presumably allow communities to single out short or overweight people for loitering prohibitions (or, as Kahan and Meares concede, gang members or youths more generally), as long as the broader community shared a “linked fate” at a more abstract level.<sup>191</sup>

Finally, even if courts could determine as an evidentiary matter the subjective motivations underlying public support for police conduct, Kahan and Meares’s emphasis on those motivations is inconsistent with the general notion that the permissibility of police conduct generally does not turn on subjective motivations. For example, an arrest for a low-level offense based on probable cause is lawful, even if the arresting officer had a subjective motive to use the arrest as a pretext to

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187. *Id.* at 1175–76; *see also* Meares, *supra* note 176, at 215–17 (discussing the concept of a “linked fate” among African-Americans); Meares, *supra* note 91, at 682–83 (same).

188. *See* Kahan & Meares, *supra* note 39, at 1165 n.78. To support their notion of a “linked fate” among African-Americans, Kahan and Meares cite to Meares’s prior scholarship and to articles discussing the interplay between gang members and drug dealers and law-abiding residents in inner-cities. *Id.* To say that gang members and drug dealers have law-abiding family members, or that there are occasions for mutual reliance between law-abiding elements of the community and street gangs, is not inconsistent with the notion that the majority of the community may single out youths in an attempt to control crime in their communities.

189. Meares, *supra* note 176, at 215–17 (discussing the concept of a “linked fate” among African-Americans); Meares, *supra* note 91, at 682–83 (same).

190. For example, Suzanne Meiners has explored how community policing programs frequently target youth. Suzanne Meiners, *A Tale of Political Alienation of Our Youth: An Examination of the Potential Threats on Democracy Posed by Incomplete “Community Policing” Programs*, 7 U.C. DAVIS J. JUV. L. & POL’Y 161 (2003).

191. Cole, *supra* note 39, at 1084.

investigate a different offense, because there is an objective basis for the arrest that renders the arrest reasonable.<sup>192</sup> If suspicious motivations do not undermine police conduct with an objectively reasonable basis, then compassionate motivations should not salvage police conduct lacking an objectively reasonable basis.

### III. THE PROGRAMMATIC PURPOSE APPROACH: DISTINGUISHING BETWEEN PUNITVE AND NON- PUNITIVE POLICING

As set forth in the previous Part, new discretion scholars advocate the new policing by encouraging a retreat from established jurisprudence. This Part challenges the new discretionists' assumption that current doctrinal rules necessarily conflict with the new policing models. In doing so, this Part explores a distinction virtually ignored by current scholarship between punitive and non-punitive programs within the new policing models.

A handful of scholars have responded to the new discretion scholarship by defending current limitations on police discretion. However, they have done so without entertaining a threshold question of whether all new policing models necessarily fall within the applicable scope of the rules that they defend. For example, responding primarily to Kahan and Meares, Professors Cole, Alschuler, and Schulhofer have defended the void for vagueness doctrine.<sup>193</sup> They maintain that Kahan and Meares overstate both the political power and the support for order-maintenance policing among African-Americans.<sup>194</sup> They also criticize the malleability of the Kahan and Meares thesis, questioning whether it has any limits at all.<sup>195</sup> Cole further attacks the Kahan and Meares position that freedom from crime is a co-equal component of liberty with freedom from government intrusion. Cole argues that official misconduct is a qualitatively-different, more destructive harm—

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192. See *Whren v. United States*, 517 U.S. 806, 808–19 (1996) (vehicle stop based on police officers' observation of several traffic offenses was lawful, even if the officers initiated the stop to facilitate investigation of drug offenses for which they lacked reasonable suspicion or probable cause).

193. Alschuler & Schulhofer, *supra* note 109, at 225–44; Cole, *supra* note 39, at 1082–90.

194. Alschuler & Schulhofer, *supra* note 109, at 217–25; Cole, *supra* note 39, at 1074–82.

195. Alschuler & Schulhofer, *supra* note 109, at 242–43 (wondering if the “next step might be to say if you hate the sin but love the sinner, you can share her burden”) (internal footnote omitted); Cole, *supra* note 39, at 1084 (criticizing concept of “linked fate” as a limit upon Kahan and Meares’s political process theory).

particularly to African-Americans—than harm from private, unofficial criminal offenders.<sup>196</sup> By arguing to retain vagueness review of criminal laws without addressing which categories of new policing initiatives should be subject to such review, Cole, Alschuler, and Schulhofer appear to assume—at least implicitly—that all new policing initiatives are punitive.

Other critics of the new policing appear to share this assumption without squarely entering the debate over the void for vagueness doctrine. For example, Bernard Harcourt has been critical of the new policing models, particularly the broken windows theory underlying them.<sup>197</sup> He argues that the theory lacks empirical support and, in any event, emphasizes only order-maintenance policing's benefits, without taking into account the resulting harms.<sup>198</sup> To Harcourt, an accurate cost-benefit calculation must also consider the hardship of misdemeanor arrests on a largely harmless population of arrestees, the increased risks of police misconduct that accompany increased arrests, the disparate impact that order-maintenance policing has on racial minorities, and the delegation of authority to police about whom to arrest.<sup>199</sup> Similarly, Fagan and Davies have compiled statistical evidence indicating that zero-tolerance policing, at least in New York City, adversely affects racial minorities.<sup>200</sup> Both Harcourt and Fagan and Davies critique order-maintenance policing for cracking down on disorder, but neither distinguishes between punitive and non-punitive responses to disorder.

Viewed as non-criminal programs, much of the new policing might conform with current constitutional jurisprudence. This Part pursues the distinction between punitive and non-punitive policing models in four subparts. Subpart A develops a distinction at a programmatic level between policies that pursue criminal law's traditional objectives of retribution and deterrence through punishment, and those that pursue non-punitive objectives. Although existing criminal procedural rules should not apply to many of the policies implemented under the new

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196. Cole, *supra* note 39, at 1089–90.

197. HARCOURT, *supra* note 29, at 90–104.

198. *Id.* at 213.

199. See *id.* at 57–89, 212–14; Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 154–61 (discussing order-maintenance policing); see also Thacher, *supra* note 8, at 770 (agreeing with Harcourt that the potential “side effects” of new policing models, such as distortion of ideals about appropriate law enforcement, must be taken into account when determining their efficacy).

200. Fagan & Davies, *supra* note 19, at 475–96.

policing models, the level of scrutiny should be determined by examining the programmatic purpose of the policy, not by manipulating the rhetoric of community.

To develop further the distinction between punitive and non-punitive programs, Subpart B examines neighborhood exclusion ordinances as an example, incorporating existing jurisprudence regarding police conduct that advances a “special need” and the developing jurisprudence defining the heart of criminal punishment. Subpart C then reexamines Chicago’s anti-gang loitering ordinance as a non-punitive response to gang activity. Finally, Subpart D discusses the advantages of the programmatic purpose model over the current new discretion scholarship.

#### *A. Abandoning Rhetoric and Developing Meaningful Distinctions*

At least implicit in the new discretion scholarship is the assumption that existing constitutional jurisprudence governing criminal law and procedure must be changed before cities can take full advantage of the promise of the new policing models. Examination of the programs approved by the new discretion scholars, however, reveals that at least some of these programs fall well outside of any traditional notion of the criminal justice system and should therefore be free from scrutiny under the jurisprudence that the new discretion scholars seek to overhaul. Responding effectively to the low-level, frequent occurrences that trouble neighborhood residents often involves creating long-term, preventative solutions rather than responding to individual crimes after the fact through arrest and prosecution. Other new policing initiatives, however, clearly implicate the traditional constitutional concerns raised by citizen-police encounters, despite the “community policing” labels. The current academic literature regarding the new policing models fails to explore the fuzzy middle between these two extremes, focusing entirely on the rhetoric of “community” policing and ignoring an important distinction between punitive and non-punitive initiatives in the new policing models.

Consider, for example, police collaboration with community groups to pick up garbage, paint over gang graffiti, or plant flowers.<sup>201</sup> These

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201. See, e.g., Waldeck, *supra* note 13, at 1271–77 (discussing New York City Transit Authority’s Clean Car Program, involving immediate removal of graffiti from subway trains, and contrasting it with the New York Police Department’s zero-tolerance approach). Neal Katyal has called attention to the potential of architecture as instrumental in crime control, an approach that

efforts are made under the new policing approach, are favored by the new discretion scholars, and clearly do not raise constitutional questions under existing jurisprudence. In contrast, some new policing techniques simply resort to the traditional law enforcement model, with a shifted emphasis on low-level, quality of life offenses. For example, New York City's zero-tolerance campaign devoted street-level policing efforts to the enforcement of low-level criminal prohibitions such as turnstile jumping, aggressive panhandling, and squeegeeing windows.<sup>202</sup> Other than the emphasis on low-level offenses, zero-tolerance policing mirrors rapid-response policing: officers become aware of an offense, arrest an individual offender, and refer the case for prosecution on criminal charges.<sup>203</sup>

New policing efforts can fall somewhere between the extremes of flower planting and zero tolerance. Consider, for example, a hypothetical noise ordinance that, instead of criminalizing unreasonable noise, authorizes police to seize any devices used to make unreasonable noise pending an administrative hearing to determine whether the devices should be returned.<sup>204</sup> Unlike community clean-up and flower planting, this hypothetical ordinance responds to an individual problem directly. The ordinance would give police leverage to negotiate compliance with norms at the street level; indeed, even a resistant noise-maker who is unwilling to negotiate could ultimately be silenced through seizure. However, unlike traditional criminal law, the ordinance does not seek to deter future noise violations by convicting and punishing the offender.

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presents few constitutional concerns. Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 *passim* (2002).

202. See, e.g., Greene, *supra* note 28, at 174–75 (describing New York Police Department's zero-tolerance approach).

203. See, e.g., Fagan & Davies, *supra* note 19, at 471 (noting that the focus of New York City's policing approach was controlling disorder, and "the tactic to achieve it was arrest, the most traditional of law enforcement tools"); Greene, *supra* note 28, at 175 (noting that New York City's zero-tolerance approach is "grounded in traditional law enforcement methods and in relentless crackdown campaigns to arrest and jail low-level drug offenders and other petty perpetrators").

204. Ordinances resembling this hypothetical are not uncommon. In Chicago, police are authorized to impound any vehicle used to violate the city's sound device restrictions. If a hearings officer determines that there is probable cause that the vehicle was used to violate the restrictions, the vehicle is not returned until the owner pays a cash bond of \$500 plus towing fees. CHI., ILL., MUNICIPAL CODE § 11-4-1115 (2002). It is increasingly common for cities to authorize police to impound devices used to make excessive noise, primarily vehicles containing booming stereos, as evidence of an unreasonable noise violation. See, e.g., SAN DIEGO, CAL., MUNICIPAL CODE § 59.5.0502(b)(3) (2000) (authorizing those who enforce the prohibition against unreasonable noise to seize as evidence any component transmitting or amplifying the noise and authorizing police to impound vehicles containing such a component if the component cannot readily be removed).



Accordingly, constitutional rules that govern criminal law and procedure are arguably inapplicable.

Implicit in the new discretion scholarship is the assumption that any law giving authority to police should be analyzed as a criminal statute. For example, Livingston recognizes that the community clean-up aspect of the new policing approaches does not implicate any constitutional concerns.<sup>205</sup> However, she appears to assume that if police go beyond these types of clean-up efforts and attempt to enforce norms of orderliness, their conduct necessarily presents legal problems under current jurisprudence.<sup>206</sup>

Rather than focus on the unique programmatic purposes often (but not always) pursued by the new policing approaches, the new discretion scholars have attempted to mark these approaches as unique by emphasizing the role of the community. To some extent, it is not surprising that the early scholarship in this area has fallen into this trap, as the police approaches themselves are cloaked in community rhetoric and do not expressly highlight their non-traditional operational mechanisms. A more meaningful basis upon which to distinguish much (but not all) of the new policing from traditional criminal law is its underlying programmatic purpose of solving public safety problems other than through the traditional mechanism of deterring and punishing through arrests, convictions, and criminal sentences.

#### *B. Drug Free Zones: An Example*

If the hypothetical noise ordinance above demonstrates the possibility of using non-punitive ordinances to solve criminal law problems, actual ordinances across the country show just how far this approach can be taken. This subpart explores neighborhood exclusion under “drug free zone” ordinances as an example of how cities can gain control over the use of public spaces without resorting to criminal punishment.

The neighborhood exclusion concept originated in Portland, Oregon, with the enactment of a city ordinance designating discrete geographical areas as “drug free zones” based on their high incident rates of drug

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205. One of Livingston’s examples of the new policing involved police officers working with other municipal agencies to improve the physical deterioration of housing projects by removing trash and abandoned cars from the neighborhood, an effort that was followed by a notable decrease in residential burglaries. Livingston, *supra* note 6, at 575. This clearly does not raise any criminal procedural questions, just as new policing efforts avoid any legal questions when they eradicate graffiti by painting over it instead of attempting to catch suspects with paint cans in hand. *Id.* at 584.

206. *Id.* at 584–85.

crimes.<sup>207</sup> If a person is arrested for committing a drug crime in a public area of a drug free zone, police exclude the individual from the zone for ninety days.<sup>208</sup> Entry into a drug free zone in violation of an exclusion order constitutes criminal trespass, a misdemeanor defined by the state penal code.<sup>209</sup> The exclusion orders are effective automatically<sup>210</sup> unless the excluded individual invokes one of two important procedural protections. First, the individual has the right to file an administrative appeal to challenge the basis for the exclusion.<sup>211</sup> Once the appeal is filed, the exclusion is stayed while the appeal is pending.<sup>212</sup>

Second, even if the excluded individual does not challenge the basis for the exclusion itself, he may seek a variance from the police to enter the zone for a broad variety of purposes.<sup>213</sup> Variances can be granted if the individual lives, works, goes to school, or needs access to social services or “essential needs” within the zone.<sup>214</sup> Additionally, the ordinance authorizes “general” variances that may be issued for “any reason” to “an excluded person who presents a plausible need to engage in any non-criminal activity.”<sup>215</sup> The ability to obtain a variance is so broad, in fact, that the ordinance arguably acts more like a targeted loitering ordinance than an exclusion ordinance. In other words, the practical effect of a neighborhood exclusion order is not an absolute prohibition against the individual entering the zone, but a restriction on

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207. PORTLAND, OR., CITY CODE §§ 14B.20.010–.070 (2002). The City Council determines the drug free zone designations based on the number of drug arrests made in an area in the previous twelve months, revisiting the zone designations every few years. *Id.* §§ 14B.20.010–.020; *see* State v. James, 978 P.2d 415 (Or. Ct. App. 1999). Portland also has a prostitution free zone ordinance that enables police to exclude individuals from high-vice neighborhoods. PORTLAND, OR., CITY CODE §§ 14B.30.010–.070.

208. PORTLAND, OR., CITY CODE § 14B.20.030(A). The ordinance does not apply if the drug offense is committed within a private residence. *Id.* If the actor is eventually convicted of the crime for which he is arrested, he is issued a separate exclusion of one-year duration. *Id.* § 14B.20.030(B).

209. *See, e.g.*, OR. REV. STAT. § 164.245 (2001) (defining criminal trespass in the second degree as entering or remaining unlawfully in or upon premises); *see also* MODEL PENAL CODE § 221.2 (1985) (prohibiting criminal trespass).

210. PORTLAND, OR., CITY CODE § 14B.20.060(A)(6) (providing that if excluded individual does not file a notice of appeal, the exclusion takes effect on the eighth day following the initial notice of exclusion).

211. *Id.*

212. *Id.*

213. *Id.* § 14B.20.060(B).

214. *Id.*

215. *Id.*

his ability to move within the zone without an articulated purpose approved in advance by police.<sup>216</sup>

Unlike Chicago's anti-gang loitering ordinance, drug free zone ordinances have not been the subject of considerable academic commentary.<sup>217</sup> In lower courts, opponents of neighborhood exclusion ordinances have had limited success arguing that exclusion orders constitute punishment.<sup>218</sup> However, the argument that neighborhood exclusion constitutes punishment appears to assume that *any* impairment of an individual's status quo constitutes punishment, an assumption clearly at odds with current law.

After a brief flirtation with aggressive judicial scrutiny of supposedly civil legislation,<sup>219</sup> the U.S. Supreme Court made clear in *Hudson v. United States*<sup>220</sup> that whether a penalty constitutes criminal punishment

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216. Andrew Leipold has suggested that one cure for loitering ordinances is to target only those who have already broken the law. Andrew D. Leipold, *Targeted Loitering Laws*, 3 U. PA. J. CONST. L. 474, 483 (2001). In some respects, Portland's drug free zone ordinance conforms to Leipold's model by excluding those who have been arrested for a drug-related offense, but then permitting excluded individuals to obtain variances permitting them to move within the zone, but only for specified purposes.

217. *But see* Schragger, *supra* note 8, at 408 n.131 (citing Cincinnati's drug exclusion zone ordinance as an example of a law that essentially zones a targeted geographic area as drug free); Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 129 (2002) (primarily discussing anti-gang loitering ordinances, but citing Cincinnati's drug free zone ordinance as demonstrating "the lengths to which cities will go in order to carve out zones where different—and more restrictive—laws apply to combat perceived crime problems").

218. The issue of whether neighborhood exclusion constitutes punishment has been litigated in the double jeopardy context, with excluded individuals arguing that they may either be excluded from a neighborhood or prosecuted criminally for the underlying conduct, but not both. One federal district court agreed with opponents of neighborhood exclusion ordinances that neighborhood exclusion constitutes criminal punishment, but the Court of Appeals affirmed the district court's decision on separate grounds. *See Johnson v. City of Cincinnati*, 119 F. Supp. 2d 735, 747–49 (S.D. Ohio 2000) (holding that neighborhood exclusion ordinance violated defendant's right to be free from double jeopardy by allowing him to be convicted of the underlying drug offense and to be excluded from neighborhood), *aff'd on other grounds*, 310 F.3d 484 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2276 (2003). In contrast, Oregon's courts have held that neighborhood exclusion does not constitute criminal punishment. *State v. Lhasawa*, 55 P.3d 477, 561 (Or. 2002) (concluding that neighborhood exclusion is a civil sanction that does not implicate double jeopardy concerns); *State v. James*, 978 P.2d 415, 417–21 (Or. Ct. App. 1999) (same).

219. *See United States v. Halper*, 490 U.S. 435, 446–52 (1989) (holding that supposedly civil penalties for false Medicare reimbursement claims constituted punishment because they were not related to the actual damages from the fraud); *United States v. Ursey*, 518 U.S. 267, 283–92 (1996) (refusing to apply *Halper* analysis to *in rem* civil forfeitures). The Court has expressly abandoned *Halper* as being too quick to label a penalty as criminal punishment. *Hudson v. United States*, 522 U.S. 93, 100–03 (1997).

220. 522 U.S. 93 (1997).

is a matter of statutory construction requiring a two-part inquiry.<sup>221</sup> The first question is whether the legislature enacting the penalty expressly labeled it as civil or criminal.<sup>222</sup> Second, even if the penalty is designated as civil, the court must ask whether the penalty is so punitive in either its purpose or effect as to transform what was purportedly intended as a civil penalty into a criminal one.<sup>223</sup> Seven factors, originally set forth by the Court in *Kennedy v. Mendoza-Martinez*,<sup>224</sup> serve as guideposts for answering the second question.<sup>225</sup> These factors ask whether the scheme is in response to criminal conduct, requires scienter, imposes an affirmative restraint, promotes the traditional aims of criminal punishment, is rationally connected to a non-punitive purpose, has historically been regarded as punishment, or is excessive in relation to its supposed civil purpose.<sup>226</sup>

Municipalities enacting drug free zone ordinances have designated neighborhood exclusion as a civil penalty.<sup>227</sup> Accordingly, the relevant inquiry under *Hudson* is whether, in light of the seven *Mendoza-Martinez* factors, exclusion is so harsh in purpose or effect as to reveal a contrary nature.<sup>228</sup> Two of the seven factors do suggest punishment.<sup>229</sup> Exclusion orders are issued in response to conduct constituting a crime, such as drug possession.<sup>230</sup> These crimes, in turn, require proof of at least some mens rea.

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221. *Id.* at 99.

222. *Id.* (“A court must first ask whether the legislature, ‘in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.’”) (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)).

223. *Id.*

224. 372 U.S. 144 (1963).

225. *Id.* at 168–69.

226. *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 1149 (noting the relevance of the seven *Mendoza-Martinez* factors), *reh’g denied*, 123 S. Ct. 1925 (2003); *Hudson*, 522 U.S. at 99 (same); *Ward*, 448 U.S. at 249 (same).

227. PORTLAND, OR., CITY CODE § 14B.20.030 (2002) (entitled “Civil Exclusion”); *State v. James*, 978 P.2d 415, 419 (Or. Ct. App. 1999) (“It is undisputed that [the exclusion provisions] were expressly designated as civil.”).

228. *See Hudson*, 522 U.S. at 99.

229. *James*, 978 P.2d at 420 (concluding that the *Hudson* factors of scienter and whether conduct constitutes a crime supported the defendant’s argument that exclusion constituted criminal punishment).

230. *See* PORTLAND, OR., CITY CODE § 14B.20.030(A) (setting forth the drug crimes that trigger neighborhood exclusion under Portland’s drug free zone ordinance). Under the prostitution-free zone ordinance, neighborhood exclusions are issued based on an arrest for prostitution-related offenses. *See id.* §§ 14B.30.010–.070.

However, such suggestion of punishment is not necessarily dispositive in the case of neighborhood exclusion orders. As an initial matter, future ordinances employing the neighborhood exclusion concept could be drafted to trigger police authority in response to conduct that does not constitute a crime and does not require proof of a culpable mental state. More importantly, under *Hudson*, no one factor is determinative—all must be given consideration.<sup>231</sup> As demonstrated below, the five remaining *Mendoza-Martinez* factors all suggest that neighborhood exclusion does not constitute punishment.

### *I. No Affirmative Restraint*

First, neighborhood exclusion is not an “affirmative restraint” under the Court’s apparent conception of that term.<sup>232</sup> Unfortunately, the Court has given little guidance about what constitutes an “affirmative restraint,” suggesting obliquely that the term as “normally understood” provides sufficient clarity.<sup>233</sup> The Court has indicated that the definition of affirmative restraint might be extremely narrow, including only those sanctions that approach the “‘infamous punishment’ of imprisonment.”<sup>234</sup> The Court has held, for example, that the civil commitment of sexual offenders constitutes an affirmative restraint,<sup>235</sup>

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231. Under the U.S. Supreme Court’s current jurisprudence, the seven *Mendoza-Martinez* factors are guideposts; no single factor is determinative. See *Hudson*, 522 U.S. at 101 (rejecting *Halper* analysis in part because it rendered one of several relevant factors dispositive).

232. But see *James*, 978 P.2d at 419 (concluding with little analysis that a drug free zone exclusion was an affirmative restraint because it limited an individual’s freedom to enter a specific area).

233. *Hudson*, 522 U.S. at 104 (noting that money penalties and occupational disbarment did “not involve an ‘affirmative disability or restraint,’ as that term is normally understood”).

234. *Id.* (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)); see also *State v. Lhasawa*, 55 P.3d 477, 486 (Or. 2002) (noting that recent U.S. Supreme Court decisions “appear to suggest that nothing short of imprisonment would qualify as an affirmative disability or restraint”). In holding that a prohibition against participation in the banking industry did not constitute an affirmative restraint, the Court in *Hudson* simply noted that the petitioners’ sanction was “certainly nothing approaching the infamous punishment of imprisonment” and did not constitute an affirmative restraint “as that term is normally understood.” *Hudson*, 522 U.S. at 104 (internal citations and quotations omitted). The Court has not made clear whether “affirmative restraints” encompass only those things that approach imprisonment, or whether the concept of an affirmative restraint as “normally understood” is broader. At least one circuit court has adopted the former, narrow notion of affirmative restraint, asking only whether the sanction approaches imprisonment. See *Cutshall v. Sundquist*, 193 F.3d 466, 474 (6th Cir. 1999) (noting that the question of whether something is an affirmative restraint or disability depends on whether the sanction approaches imprisonment).

235. *Kansas v. Hendricks*, 521 U.S. 346, 360–69 (1997) (holding that, although civil commitment of sexual offenders who were rendered incurably dangerous by mental disorder constituted an

but that mandatory registration as a sexual offender does not.<sup>236</sup> Exclusion from a discrete geographic area within a city does not involve imprisonment.<sup>237</sup>

Some of the Court's decisions, however, suggest that a sanction short of literal confinement can constitute an affirmative restraint. Most recently, the Court explained that the appropriate inquiry asks "how the effects of the . . . [scheme] are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive."<sup>238</sup> Applying that test, the Court concluded that the mail-in registration required by Alaska's sex offender registration and notification scheme did not impose an affirmative restraint, but appeared to entertain the notion that an in-person registration requirement might be considered an affirmative restraint.<sup>239</sup>

Even if there is room within the affirmative restraint concept for sanctions other than confinement, it clearly does not encompass every sanction that restricts the activities of an individual.<sup>240</sup> For example, in

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affirmative restraint, it did not constitute criminal punishment that implicated the double jeopardy clause).

236. *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 1151–54 (upholding Megan's Law against an ex post facto challenge and holding that registration and notification scheme did not impose an affirmative restraint), *reh'g denied*, 123 S. Ct. 1925 (2003).

237. *Cf. Hendricks*, 521 U.S. at 363 (holding that civil commitment, although not necessarily punishment, is an affirmative restraint); *United States v. Salerno*, 481 U.S. 739, 749 (1987) (discussing pretrial incarceration).

238. *Smith*, 123 S. Ct. at 1151.

239. *Id.*; *see also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (concluding that deportation of draft evaders amounted to punishment, without determining whether it constituted an affirmative restraint).

240. Even courts using a notion of affirmative restraint that goes beyond literal confinement have conceded that sanctions of limited scope do not constitute affirmative restraints under current punishment jurisprudence. For example, in an opinion ultimately reversed by the U.S. Supreme Court, the Ninth Circuit created a circuit court split by using a broad notion of affirmative restraint (and also of punishment) to strike down as double punishment Alaska's program for registering convicted sex offenders and notifying communities regarding their presence. *Doe I v. Otte*, 259 F.3d 979, 983–95 (9th Cir. 2001), *rev'd sub nom. Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, *reh'g denied*, 123 S. Ct. 1925 (2003). Despite the broad standards for punishment applied in *Doe I*, even the *Doe I* court conceded that a more limited sanction would not constitute punishment. *Id.* at 988–89. In striking down the Alaska program, the Court distinguished the program from a less onerous program previously upheld as neither an affirmative restraint nor punishment. *Id.* at 987. While the prior program required only a one-time registration, the Alaska program required multiple registrations per year for the offender's lifetime as well as community notification. *Id.* These more onerous requirements went beyond the "limited" scope of the previously upheld program and rendered the program, in the Ninth Circuit's view, an affirmative restraint. *Id.* *But see Burr v. Snider*, 234 F.3d 1052, 1054 (8th Cir. 2000) (upholding as reasonable state court's decision that sex offender registration and notification requirements were not affirmative restraints or punishment);

*Hudson*, the Court held that lifetime disbarment from the banking industry was neither an affirmative restraint nor criminal punishment.<sup>241</sup> Like disbarment from a profession, a neighborhood exclusion requires the affected individual to refrain from specified conduct, but does not require the individual to engage in any affirmative conduct. The impact of exclusion might be harsh in some cases. However, the impact is no less onerous than barring an individual from participating in what had been his lifetime career, a prohibition that was upheld in *Hudson* as neither an affirmative restraint nor criminal punishment.<sup>242</sup>

In fact, neighborhood exclusion orders are arguably a narrower limitation on an individual's status quo than a lifetime prohibition against working in one's trained profession. Current neighborhood exclusion ordinances authorize exclusion from only discrete geographic areas within the city, comprising only a small percentage of their respective metropolitan areas.<sup>243</sup> The exclusions are also for a limited duration.<sup>244</sup> Moreover, the ordinances authorize the issuance of variances.<sup>245</sup>

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Femedeer v. Haun, 227 F.3d 1244, 1250 (10th Cir. 2000) (holding that sex offender registration and community notification program was neither an affirmative restraint nor punishment); Cutshall v. Sundquist, 193 F.3d 466, 474–77 (6th Cir. 1999) (same).

241. *Hudson v. United States*, 522 U.S. 93, 103–04 (1997).

242. *Id.* at 103–05; see also *Brewer v. Kimel*, 256 F.3d 222, 228 (4th Cir. 2001) (noting harsh effect of prohibiting individual from lifetime career in *Hudson*, and holding by comparison that revocation of driver's license was not an affirmative restraint or punishment). But see *Johnson v. City of Cincinnati*, 119 F. Supp. 2d 735, 748 (S.D. Ohio 2000), *aff'd on other grounds*, 310 F.3d 484 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2276 (2003). In *Johnson*, a federal district court held that neighborhood exclusion amounted to an affirmative restraint simply because "[i]t is a restraint against the liberty of those arrested or convicted for the drug-abuse crimes." *Id.* This reasoning is wholly inconsistent with *Hudson's* express recognition that a restriction might be burdensome and yet nevertheless constitute neither an affirmative restraint nor criminal punishment. See *Hudson*, 522 U.S. at 99 (noting that the Double Jeopardy Clause does not prohibit multiple civil punishments).

243. See PORTLAND, OR., CITY CODE § 14B.20.070 (2002) (defining boundaries of Portland's drug free zones).

244. The ordinances usually authorize exclusion for ninety days, and none of the ordinances authorizes exclusion for more than a year. See ID. § 14B.20.030 (defining duration of Portland's drug free zone exclusion orders); *Johnson v. City of Cincinnati*, 310 F.3d 484, 487–88 (6th Cir. 2002) (describing duration of exclusion under Cincinnati's drug free zone ordinance), *cert. denied*, 123 S. Ct. 2276 (2003).

245. PORTLAND, OR., CITY CODE § 14B.20.060(B) (describing procedures to obtain variances under Portland's drug free zone ordinance); *Johnson*, 310 F.3d at 488 (describing procedures to obtain variances under Cincinnati's drug free zone ordinance).

## 2. *Not the Traditional Aims of Punishment*

Secondly, under *Mendoza-Martinez*, neighborhood exclusion zones do not promote the “traditional aims of punishment.” When properly understood, neighborhood exclusion ordinances do not promote retribution and deterrence, at least not in the manner in which criminal punishment traditionally does. Rather, as explained further in this Subpart, neighborhood exclusion seeks to protect a targeted geographic area from future prohibited conduct by civilly restraining and redistributing past offenders.

As an initial matter, it is worth noting that the role of police officers in issuing exclusion orders and variances does not itself render the orders criminal punishment.<sup>246</sup> Moreover, although police officers issue the exclusion orders and variances under drug free zone ordinances, all appeals are handled as administrative hearings outside of the police department and criminal courts.<sup>247</sup>

The scope of neighborhood exclusion orders suggests that they are not intended as retribution. Under any retributive notion of punishment, the duration or geographic scope of the exclusion would be linked to the severity of the wrongfulness of the excluded actor’s underlying conduct.<sup>248</sup> One would also expect exclusion orders designed to extract retribution to prohibit the wrongful actor from entering his *own* neighborhood, so that the punishment in each case would deprive the offender of his own community. Moreover, a retributive exclusion presumably would not permit variances for individuals who lived within the community. In contrast, civil neighborhood exclusion orders are identical, regardless of the severity of the underlying criminal offense;

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246. *Cf.* *New York v. Burger*, 482 U.S. 691, 717–18 (1987) (holding that inspection by police officers of automobile junkyard premises should be evaluated by standards applicable to administrative searches, and not as a traditional search for criminal evidence, even though the administrative process was implemented by law enforcement officers).

247. *See Hudson*, 522 U.S. at 103 (holding that Congress’s decision to vest disbarment authority in administrative agencies suggested that Congress intended disbarment as a civil sanction, not a criminal one).

248. Traditional criminal law achieves retribution by punishing past wrongs. *See generally* IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (John Ladd trans., 1965); MICHAEL S. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 233–37 (1984); MICHAEL S. MOORE, *PLACING BLAME* (1997); David Dolinko, *Three Mistakes of Retributivism*, 39 *UCLA L. REV.* 1623 (1992); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. REV.* 1659 (1992); H.J. McCloskey, *A Non-Utilitarian Approach To Punishment*, 8 *INQUIRY* 249 (1965); Jeffrie G. Murphy, *Retributivism, Moral Education, and the Liberal State*, 4 *CRIM. JUST. ETHICS* 3, 3–11 (1985).



apply only to pre-designated high-crime zones, regardless of the offender's residence; and permit variances to accommodate offenders who live within those zones.

Although neighborhood exclusion orders are not intended as retribution, they certainly are intended to reduce criminal activity within the zones, a purpose that falls within any broad conception of deterrence.<sup>249</sup> However, the U.S. Supreme Court has recognized that both civil and criminal penalties can have deterrence goals.<sup>250</sup> For example, sexual offender registration and notification requirements are undoubtedly intended to deter future crimes; nevertheless, the Court has held that such schemes do not impose criminal punishment.<sup>251</sup>

In *State v. James*,<sup>252</sup> the Oregon Court of Appeals held that neighborhood exclusions did not promote the aims of traditional criminal punishment. Although the *James* court reached the right result, it did so with flawed reasoning. The court reasoned that the deterrent goals of neighborhood exclusions were civil rather than criminal, because the city's ultimate legislative concerns were not about drug activity per se, but rather about the collateral consequences of that activity on neighborhood property values, business activity, and general quality of life.<sup>253</sup>

By looking at the legislative concerns motivating the imposed penalties, rather than the nature of the penalties themselves, the court made it too easy for lawmakers to evade criminal procedural rules by doctoring their legislative history. If what matters are the goals of legislators (regardless of the penalty they design to reach those goals), any penalty will fall on the civil side of this *Hudson* factor as long as lawmakers avoid tough-on-crime rhetoric in their legislative history and

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249. See generally DRESSLER, *supra* note 145, at 15 (discussing deterrence).

250. *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 1152 ("Any number of governmental programs might deter crime without imposing punishment."), *reh'g denied*, 123 S. Ct. 1925 (2003); *Hudson*, 522 U.S. at 105 (noting that a civil penalty's deterrent goals do not render the sanction criminal, "as deterrence 'may serve civil as well as criminal goals'") (quoting *United States v. Ursery*, 518 U.S. 267, 292 (1996)).

251. *Smith*, 123 S. Ct. at 1152 (upholding retroactive enforcement of Megan's Law against an *ex post facto* challenge and noting that "[t]o hold that the mere presence of a deterrent purpose renders such sanctions criminal . . . would severely undermine the Government's ability to engage in effective regulation") (internal citations and quotations omitted).

252. 978 P.2d 415 (Or. Ct. App. 1999).

253. *Id.* at 420.

speak instead of broader concerns that are traditionally the aims of civil law.<sup>254</sup>

The U.S. Supreme Court has already made clear in a separate context that the rules of criminal procedure are not so easily avoided. In *Ferguson v. Charleston*,<sup>255</sup> the Court addressed the constitutionality of testing pregnant women for drugs at public hospitals. The ultimate purpose behind the drug testing program was to reduce the number of drug-influenced babies by using the threat of criminal prosecution to persuade drug-addicted pregnant women to obtain substance abuse treatment.<sup>256</sup> The government argued that this ultimate goal was a special need beyond traditional law enforcement, and, therefore, pregnant women could be tested without a warrant or probable cause.<sup>257</sup> Nevertheless, the Court held that the drug testing program violated the Fourth Amendment.<sup>258</sup> In doing so, the Court rejected the government's special needs analysis by scrutinizing the program's actual content, rather than its ultimate goal. When viewed for its "programmatic purpose" rather than its ultimate objectives, the drug testing program operated by generating evidence to be used in a criminal prosecution. That the ultimate objective revealed a kinder, gentler form of law enforcement was insufficient to demonstrate a special need for Fourth

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254. Existing neighborhood exclusion ordinances contain such language within the introductory subsections, typically with a statement from the city council that the higher incidences of criminal activity within the designated zones are deteriorating the quality of life in those neighborhoods. *See, e.g.*, Cincinnati, Ohio, Ordinance 229-1996 (Sept. 6, 1996) (city council finding that the city "has a substantial and compelling interest in restoring the quality of life and protecting the health, safety, and welfare of citizens using the public ways in [the zones]"); Portland, Or., Ordinance 170913 (Feb. 12, 1997) (city council finding that drug activity within zones "contribute[d] to the degradation of these areas and adversely affect[ed] the overall quality of life for the areas' residents, businesses and visitors").

255. 532 U.S. 67 (2001).

256. *Id.* at 82–83 (noting that "the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs").

257. *Id.* at 73, 81. In a series of cases, the Court has upheld warrantless, suspicionless searches justified by a "special need" beyond ordinary criminal law. *See, e.g.*, *Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002) (upholding as reasonable drug testing of students involved in extracurricular activities); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 665 (1995) (upholding as reasonable drug testing of school athletes); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (upholding as reasonable drug testing program for certain employees of United States Customs Service); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 633–34 (1989) (upholding as reasonable a drug testing program for railway employees involved in train accidents); . *cf.* *Chandler v. Miller*, 520 U.S. 305, 322–23 (1997) (striking down as unreasonable program requiring drug testing of candidates for state elected office).

258. *Ferguson*, 532 U.S. at 81–84.

Amendment purposes, “[b]ecause law enforcement involvement *always* serves some broader social purpose or objective.”<sup>259</sup>

### 3. *Connection To Civil Purposes*

Although the *James* court applied a test that makes avoidance of criminal procedural requirements too easy, it reached, I believe, the correct result. Stated in *Mendoza-Martinez* terms, neighborhood exclusions are civil in nature not because they are motivated by a civil purpose, but because of the way in which they *connect* to that civil purpose.<sup>260</sup> In other words, what matters most is not that neighborhood exclusion ordinances seek to improve neighborhood quality of life, but that they do so through a remedial penalty rather than through traditional criminal punishment.

As an initial matter, the nature of the restraint is similar to a civil restraining order. For example, assault victims routinely obtain restraining orders preventing their assailants from coming within a certain distance of them, and this does not constitute criminal punishment.<sup>261</sup> These orders can restrain respondents from contacting not just the immediate victims of assaults, but related individuals, and they often require respondents to move from their homes.<sup>262</sup> Nevertheless, they are seen as civil restraints.<sup>263</sup> Drug free zone exclusions are an extension of the restraining order concept, treating the neighborhood as the victim of the individual’s drug activity.

A second way of understanding neighborhood exclusion as a civil remedy, despite its deterrent purpose, requires an understanding of the

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259. *Id.* at 84 (emphasis added).

260. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (holding that whether a sanction has an assignable non-criminal purpose is one of seven factors in determining whether sanction is punitive in nature).

261. See Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L.Q. 43, 44 (1989) (noting that double jeopardy does not prohibit a subsequent prosecution for the same act for which a family abuse civil protection order is issued); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1122 (1993) (same).

262. See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1406 & n.431 (1991) (noting that almost all domestic abuse civil protection order statutes permit courts to evict the respondent from his own residence); Klein & Orloff, *supra* note 261, at 921–22 (noting that civil restraining orders have required respondents to stay away from the petitioner’s residence even when he, rather than the petitioner, was the lawful owner).

263. Finn, *supra* note 261, at 44; Klein & Orloff, *supra* note 261, at 1122.

theory on which the program is premised. Traditional criminal punishment (e.g., imprisonment) is thought to deter in two familiar ways.<sup>264</sup> The goal of specific deterrence is to deter an individual actor's future misconduct both by incapacitating him and by teaching him that he will suffer further punishment if he reoffends upon release.<sup>265</sup> General deterrence aims to dissuade the general population from engaging in criminal conduct by notifying the population of the consequences of such conduct through the punishment of individual actors.<sup>266</sup>

These traditional means of deterrence play at most a minor role in the goals of neighborhood exclusion orders. Exclusion from individual neighborhoods does not prevent the excluded actor from engaging in criminal conduct outside of the zone. The most that can be said is that the order aims to prevent the individual from committing offenses *within the zones*. Moreover, it is difficult to imagine that the prospect of a short-term order of exclusion significantly tips a would-be offender's cost-benefit calculation, either at a specific or general level, when the relevant conduct is already subject to criminal penalties. Finally, even if neighborhood exclusion orders have some incidental effects that resemble traditional deterrence, the same could be said of civil fines, and yet those are not necessarily considered criminal penalties.<sup>267</sup>

Although the goal of neighborhood exclusion orders, like traditional punishment, is to reduce the number of drug offenses (at least within the designated zones), they do so in an operational manner that is entirely different from traditional deterrence functions. When distinguishing between traditional law enforcement and non-criminal enforcement in the Fourth Amendment context, the U.S. Supreme Court has recognized that civil and criminal law regimes might share the same ultimate

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264. A utilitarian theory of punishment assumes that actors commit crimes when it is in their interest to do so. Accordingly, the optimal punishment is one that is just sufficient to make the perceived costs of the undesired act outweigh the anticipated advantages of the act, considering for example the likelihood and likely severity of the punishment. See Steven Klepper & Daniel Nagin, *The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited*, 27 CRIMINOLOGY 721 (1989). See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1982) (1789); JOHN STUART MILL, UTILITARIANISM (Longmans, Green, & Co. 1907) (1863); FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL (1973).

265. See DRESSLER, *supra* note 145, at 15 (discussing specific deterrence).

266. See *id.* (discussing general deterrence).

267. For example, one claimed benefit of our compensatory tort law system is to alter the cost-benefit balance applicable to negligent conduct. When the potential costs of a tort law suit are taken into account, repairing broken sidewalks and designing goods safely are not just kindhearted acts; they are rational. Yet, such damages are considered civil, not criminal, in nature.

purposes, but can nevertheless be distinguished on the basis of their methodologies. In *New York v. Burger*,<sup>268</sup> for example, the Court upheld a New York City administrative program that authorized police to conduct warrantless searches of businesses involved in the dismantling of automobiles.<sup>269</sup> Although traditional law enforcement searches are presumed to be unreasonable and in violation of the Fourth Amendment in the absence of probable cause and a warrant,<sup>270</sup> the Court held that searches pursuant to New York's administrative scheme were reasonable because they were justified by a "special need" that was separate from the ordinary needs of traditional law enforcement.<sup>271</sup>

In doing so, the Court expressly rejected the notion that a government program's purpose was the sole determinant of whether civil or criminal procedural rules governed its constitutionality. New York's highest court had struck down the statute authorizing the searches in part because the statute targeted criminal activity.<sup>272</sup> The Court reversed, noting that a state can choose to address major social concerns through both administrative and penal regimes.<sup>273</sup> "Administrative statutes and penal laws may have the same *ultimate* purpose of remedying the social problem, but they have different subsidiary purposes and prescribe different methods of addressing the problem."<sup>274</sup> New York's administrative scheme sought to prohibit the sale of stolen vehicle parts by setting forth how businesses should be operated, while the penal law emphasized the punishment of individuals for specific criminal acts.

As demonstrated by the contrasting results of *Burger* and *Ferguson*, there is a critical distinction between the government's use of traditional

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268. 482 U.S. 691 (1987).

269. *Id.* at 702. The statute required businesses involved in dismantling automobiles to maintain records of all transactions and to permit police to inspect those records and any automobile parts in the business's possession. *Id.* at 694 n.1. The failure to maintain the required records or to cooperate with a requested inspection was punishable as a misdemeanor. *Id.*

270. *See, e.g., Almeida-Sanchez v. United States*, 413 U.S. 266, 269–70 (1973) (reiterating previous holdings that probable cause is the Fourth Amendment's minimum requirement); *Katz v. United States*, 389 U.S. 347, 357 (1967) (equating the lack of a warrant with unreasonableness); *Johnson v. United States*, 333 U.S. 10, 13–14 (1948) (discussing the importance of the warrant requirement).

271. *Burger*, 482 U.S. at 702.

272. *See id.* at 712 (noting that Court of Appeals struck down the New York statute as violative of the Fourth Amendment because it "had no truly administrative purpose but was 'designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property'" (quoting *New York v. Burger*, 493 N.E.2d 926, 929 (N.Y. 1986))).

273. *Id.*

274. *Id.*

criminal law methods to accomplish a non-criminal ultimate objective (as in *Ferguson*), and the use of methods outside of the criminal law to accomplish objectives that are shared by the criminal law (as in *Burger*). Just as the administrative regime upheld in *Burger* shared the same ultimate objective as criminal sanctions for possession of stolen property, neighborhood exclusion ordinances share the same ultimate objective as criminal drug laws.<sup>275</sup> However, neighborhood exclusion seeks to prevent drug activity through a method that differs qualitatively from arrest and prosecution.

Neighborhood exclusion orders are thought to work not because offenders fear being subject to them, but because they operate to disrupt a retail market. In order for drug transactions to occur, buyers and sellers must locate each other. Once a given area is known for drug activity, individual sellers and buyers know to congregate there to offer and accept the product. Displacing market participants from known retail locations is intended to prevent new transactions not by incapacitating individual participants from attempting to enter into transactions (traditional deterrence), but by making it difficult for the participants to locate each other to transact.

Some might argue that neighborhood exclusion orders will simply move the drug market into surrounding neighborhoods, not disrupt it.<sup>276</sup> However, it seems probable that neighborhood exclusion orders both disrupt and displace the targeted activities.<sup>277</sup> The drug trade (like gang and vice activity) depends on group behavior. As one criminologist has suggested, drug dealing is most successful when transacted within a well-known marketplace associated with reliable participants.<sup>278</sup> With only word of mouth to rely on, participants in the drug trade cannot

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275. With respect to prostitution free zones, the ordinances creating the zones share the same ultimate objective as criminal laws against prostitution.

276. Schragger, for example, argues that the power to zone empowers one neighborhood to displace unwanted people and activities to surrounding neighborhoods, “a probably limited and short-lived success.” Schragger, *supra* note 8, at 429.

277. In Portland, for example, drug-related arrests within a defined zone decreased by an average of thirty-five percent after implementation of the exclusion program. However, on average, drug arrests in areas surrounding the targeted zone increased twelve percent. Multnomah County Neighborhood DA Unit, at <http://www2.co.multnomah.or.us/da/NDAP/index.cfm?fuseaction=strategies&menu=19&title=Drug%20Free%20Zones%20%28DFZ%29> (last visited Sept. 30, 2003) (on file with author).

278. See John E. Eck, *A General Model of the Geography of Illicit Retail Marketplaces*, in *CRIME & PLACE* 67, 73–77 (John E. Eck & David Weisburd eds., 1995).

collectively and immediately open shop in any single new location. In the process of relocating, at least *some* transactions must be lost.<sup>279</sup>

Moreover, even if displacement were the *only* effect of neighborhood exclusion ordinances, displacing crime out of high-crime neighborhoods may be both an effective and normatively appropriate crime-control strategy. If one believes that low-level crimes reach a "tipping point" at which they lead to more crime, such offenses may be less detrimental to a community if maintained beneath a threshold at which they begin to deteriorate community confidence and overall quality of life.<sup>280</sup> Furthermore, from a normative perspective, there is utility in sparing a neighborhood from bearing a disproportionately heavy burden of either a jurisdiction's crimes<sup>281</sup> or its rigorous police activities. By disbursing a city's crimes more equitably among neighborhoods, displacement can prevent relatively sheltered residential pockets from writing off street-level crimes as a problem only for the "inner-city." And if policing efforts must spread into other neighborhoods to follow the crime, that move could repeal what Randall Kennedy has called the disproportionate "tax" that racial minorities currently pay for our various wars against criminality.<sup>282</sup>

Note that both the "neighborhood victimization" and "market disruption" arguments, which distinguish neighborhood exclusion orders from traditional punishment, apply only when the exclusions are limited to neighborhoods with significant, visible activity. To argue that exclusion orders are intended to disrupt a market, the city must show the existence of such a market within the zone. Similarly, it is difficult to argue that an entire neighborhood is victimized by a single, isolated drug

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279. See Leipold, *supra* note 216, at 497 (arguing that anti-gang loitering laws do more than move gang activity, at least in the short term, because groups need time to reform and relocate).

280. See *supra* notes 22–26 and accompanying text for a discussion of the broken windows theory, which posits that visible disorder can lead to further neighborhood deterioration.

281. There is a stronger normative argument for displacing crime out of high-crime neighborhoods than out of relatively trouble-free areas. Cf. Robert W. Helsley & William C. Strange, *Gated Communities and the Economic Geography of Crime*, 46 J. URB. ECON. 80 (1999) (using an economic model to show that gated communities divert crime to other neighborhoods).

282. See Randall Kennedy, *Suspect Policy*, THE NEW REPUBLIC, Sept. 13–20, 1999, at 30, 34 (arguing that the cessation of racial profiling would repeal the "racial character" of the current "tax" for the wars against illegal immigration and drugs); see also DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 54 (1999) (arguing that "well-to-do white people" would be more likely to pressure police to regulate themselves if they were routinely subject to police-citizen encounters); Leipold, *supra* note 216, at 497 (arguing that moving gang activity from one neighborhood into another "should help spread the cost of law enforcement more equitably").

transaction within an otherwise drug-free neighborhood, and it is therefore difficult to liken members of that neighborhood to the traditional categories of victims protected by civil restraining orders.<sup>283</sup>

The broken windows theory posits that low-level disorder, if left uncorrected, leads to serious crime.<sup>284</sup> Whether one believes the link between disorder and crime is direct<sup>285</sup> or indirect,<sup>286</sup> the disorder must be *visible* under the broken windows theory in order to affect the conduct of either law-abiding members of the community or would-be troublemakers. Unlike a broken window, isolated drug transactions can go unnoticed. In order for drug activity to destabilize the community through either the direct or indirect mechanisms proffered by Wilson and Kelling, the activity would need to reach a critical mass of visibility.<sup>287</sup> When that point has been reached, neighborhood exclusion for offenders can be justified as a remedy to the neighborhood. Immediate and temporary exclusion of former drug market participants prevents potential future actors from perceiving an ongoing market and believing that no one in the community cares if further criminal activity occurs there. Moreover, with drug offenders excluded from the neighborhood, residents will feel safer using their neighborhood in lawful ways.<sup>288</sup> In

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283. See *supra* notes 261–63 and accompanying text (comparing neighborhood exclusion orders to abuse prevention restraining orders).

284. See *supra* notes 22–26 and accompanying text (summarizing the broken windows theory).

285. The direct mechanism of Wilson and Kelling's theory posits that a broken window, if left unrepaired, signals to lawbreakers that "no one cares" and leads to the rest of the windows being broken. See *supra* note 25.

286. As an indirect cause of serious crime, low-level disorder can create fear among community residents, who will begin to stay indoors, withdraw from their community, and eventually stop trying to assert control over the neighborhood. See *supra* note 24.

287. In this respect, crime can follow epidemiological patterns observed for public health risks. In his influential article, *The Tipping Point*, Malcolm Gladwell theorized that crime, like a low-level flu outbreak, can develop non-linearly. Applied to crime, the tipping point theory suggests that crime might develop linearly until a small incremental increase brings it to a critical point leading to a severe escalation in crime rates. MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000); Malcolm Gladwell, *The Tipping Point*, *THE NEW YORKER*, June 3, 1996, at 32; see also Greene, *supra* note 28, at 181 (discussing the tipping point phenomenon); George L. Kelling, *Why Did People Stop Committing Crimes? An Essay About Criminology and Ideology*, 28 *FORDHAM URB. L.J.* 567, 578 (2000) (maintaining that crime decreased in New York City because it declined to a tipping point at which crime plummeted).

288. See Wm. Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 455, 482–83 (1998) (noting about traditional banishment that "[a] community that believes that it has fewer criminals in its midst is less likely to be distrustful of itself," and that community confidence might in turn enhance community quality of life).



contrast, it would be difficult to justify neighborhood exclusion as a remedy to an entire community in a low crime area where occasional drug activity occurs below the public's threshold of perception.<sup>289</sup>

#### 4. *Not Historically Regarded as Criminal Punishment*

For many of the same reasons that neighborhood exclusion serves a civil purpose, neighborhood exclusion does not resemble traditional criminal punishment. Opponents of neighborhood exclusion have argued, and at least one court has agreed, that neighborhood exclusion amounts to banishment, a traditional criminal punishment.<sup>290</sup> Traditional banishment was intended to incapacitate the banished individual and protect citizens within the banishing jurisdiction.<sup>291</sup> Traditional banishment is undoubtedly a criminal punishment, one that generally is considered unlawful, even as a criminal sentence.<sup>292</sup> Banishment has been criticized for its failure to rehabilitate the offender,<sup>293</sup> for permitting

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289. Debra Livingston has also observed that isolated occurrences of disorder are not themselves destructive of a community. For example, she notes that a single person loitering on a corner does not threaten the neighborhood's quality of life, but the loitering of many on a single street is likely to trigger decline. *See* Livingston, *supra* note 6, at 559; *see also* Wilson & Kelling, *supra* note 22, at 35 ("Arresting a single drunk or a single vagrant who has harmed no identifiable person seems unjust, and in a sense it is. But failing to do anything about a score of drunks or a hundred vagrants may destroy an entire community.").

290. *See* Johnson v. City of Cincinnati, 119 F. Supp. 2d 735, 748–49 (S.D. Ohio 2002) (finding a double jeopardy violation where individual was both convicted of a criminal offense and excluded from a drug free zone for the same underlying conduct), *aff'd on other grounds*, 310 F.3d 484 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2276 (2003).

291. *See* Snider, *supra* note 288, at 481 (noting that banishment was most likely intended to further the goals of incapacitation and community protection).

292. *See generally* Leipold, *supra* note 216, at 490–91 (noting that many states have abolished the practice of banishment); Snider, *supra* note 288, at 484–99 (discussing bases for disallowing banishment); Jason S. Alloy, Note, "158-County Banishment" in Georgia: *Constitutional Implications Under the State Constitution and the Federal Right To Travel*, 36 GA. L. REV. 1083, 1087 (2002) (noting that courts have held banishment to be illegal because it does not rehabilitate the banished, because it permits the banishing jurisdiction to unload its undesirables upon other jurisdictions, and because it has been held to violate various state constitutions). At least fifteen states have provisions in their constitutions that expressly prohibit the banishment of individuals from the state. Snider, *supra* note 288, at 465 & n.70 (citing state constitutional provisions prohibiting banishment). Even in the absence of an express prohibition against banishment from a state, other state courts have held that sentences of banishment are unlawful on public policy grounds. *Id.* at 465–66 & n.78 (citing cases finding banishment conditions unlawful and opining that the absence of express constitutional prohibitions against banishment in the applicable state constitutions may explain the courts' use of public policy grounds to strike down the banishment conditions).

293. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1895 n.75 (1991) (noting that permanent exile appears reserved for those beyond rehabilitation and

jurisdictions to dump their criminals on neighboring jurisdictions,<sup>294</sup> for depriving the banished individual of any community,<sup>295</sup> and as a punishment unauthorized by the legislature.<sup>296</sup>

Any resemblance between contemporary neighborhood exclusion and traditional banishment is superficial at best. This point is best made by comparing both sanctions to prison, the quintessential criminal

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that the only possible rehabilitative justification for such banishment would be if the offender were so disappointed in his banishment from his original community that he would behave in the future so that he would not also lose the community to which he was moved); Snider, *supra* note 288, at 478 (“It is highly unlikely that banishment has either as its intended effect, or actually effectuates, any sort of rehabilitation.”); *see also* State v. Franklin, 604 N.W.2d 79, 83 (Minn. 2000) (excluding defendant from entire city was not reasonably related to goal of rehabilitating him); McCreary v. State, 582 So. 2d 425, 428 (Miss. 1991) (observing that banishment from a large geographical area does not serve a rehabilitative function); Johnson v. State, 672 S.W.2d 621, 623 (Tex. Ct. App. 1984) (noting that banishing defendant from county would not assist in rehabilitating him); Ray v. McCoy, 321 S.E.2d 90, 93 (W. Va. 1984) (noting that banished persons are not likely to be rehabilitated because they lack supervision while banished).

294. *Rutherford v. Blankenship*, 468 F. Supp. 1357, 1360 (W.D. Va. 1979) (holding that banishment offends public policy by allowing one state to dump criminals into another state); *People v. Baum*, 231 N.W. 95, 96 (Mich. 1930) (same); *State v. Charlton*, 846 P.2d 341, 343 (N.M. Ct. App. 1992) (same); *People v. Green*, 451 N.Y.S.2d 970, 972 (N.Y. Sup. Ct. 1982) (same); *State v. Doughtie*, 74 S.E.2d 922, 924 (N.C. 1953) (same).

295. The U.S. Supreme Court has held that deprivation of citizenship constitutes cruel and unusual punishment prohibited by the Eighth Amendment, in part because it “strips the citizen of his status in the national and international political community.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). It is perhaps due to similar concerns about the loss of community that courts have generally struck down any sentence that banishes an offender from an entire or most of a state, while upholding sentences of “banishment” that apply to only a small geographic area. *See* Snider, *supra* note 288, at 473 (noting that appellate courts have upheld probation conditions that restrict the probationer’s ability to enter a geographic area “if the banishment is confined to a small geographic area”); *see also* *United States v. Cothran*, 855 F.2d 749, 752 (11th Cir. 1988) (upholding probation condition prohibiting defendant from entering the county without the permission of his probation officer); *Dukes v. State*, 423 So. 2d 329, 331 (Ala. Crim. App. 1982) (upholding probation condition prohibiting probationer from entering the store from which she stole); *State v. Morgan*, 389 So. 2d 364, 366 (La. 1980) (upholding probation condition that required defendant, convicted of attempted prostitution, to stay out of New Orleans’s notorious French Quarter); *State v. Harrington*, 336 S.E.2d 852, 857 (N.C. Ct. App. 1985) (upholding probation condition restricting drunken driver’s ability to enter establishments selling alcoholic beverages).

296. Some courts have refused to impose banishment because the power to impose banishment belongs to the legislature and is not inherent in the judiciary. *See, e.g.,* *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (holding that “the power of confiscation and banishment does not belong to the judicial authority . . . and yet, it is a power, that grows out of the very nature of the social compact, which must reside somewhere, and which is so inherent in the legislature”); *Rutherford*, 468 F. Supp. at 1360 (stating that “the power to banish, if it exists at all, is a power vested in the Legislature”); *Weigand v. Commonwealth*, 397 S.W.2d 780, 781 (Ky. Ct. App. 1965) (holding that it is not within court’s authority to impose banishment in lieu of prison sentence); *People v. Wallace*, 124 N.Y.S.2d 201, 204 (N.Y. Co. Ct. 1953) (holding that banishment cannot be imposed by judiciary). Neighborhood exclusions, on the other hand, result from legislative action.

punishment. Even traditional banishment is distinguishable from prison in that it does not literally incapacitate; it simply prohibits the individual from offending within the banishing jurisdiction. However, traditional banishment does serve the same function as prison if viewed solely from the self-interested perspective of the banishing jurisdiction. As long as the banished individual offends outside the geographic boundaries of the banishing jurisdiction, the citizens within the banishing jurisdiction are as protected from him as if the individual were in prison.

In contrast, neighborhood exclusion does not attempt to segregate the offender from the entire constituency of the banishing political entity. Rather, it simply seeks to move the offender within the jurisdiction from one geographic subsection into others. Although the offender may be incapacitated with respect to a discrete geographic neighborhood, the offender still remains a part of the citizenry of the larger governmental entity that issues the neighborhood exclusion.<sup>297</sup> Moreover, if the offender does reoffend during the exclusion term, it is the jurisdiction that issued the exclusion order that bears the burden of the offense, not some other jurisdiction whose citizens were not represented in the decision to order the exclusion.<sup>298</sup>

Neighborhood exclusion is also distinguishable from traditional banishment because it does not deprive the excluded individual of her community. As one commentator wrote recently about traditional banishment,

In its most general and benign form, banishment is the punishment of one who has incurred the displeasure of a group to which one had previously enjoyed full membership status. As a means of expressing displeasure with the conduct of the banished, the community takes the ultimate step and declares that the banished individual is no longer a part of the community. . . . [T]he banished individual presumably retains *no* rights of membership in the community from which he/she was banished.<sup>299</sup>

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297. For the same reason that neighborhood exclusion orders do not further incapacitation, a traditional goal of criminal punishment, the orders do not deprive offenders of the political process. Although excluded from a geographic subsection of the city, excluded individuals retain their membership within recognized political entities. *But see* Snider, *supra* note 288, at 495 (arguing that traditional banishment deprives individuals of their ability to participate in the political process).

298. See *supra* notes 276–82 and accompanying text for the potential of neighborhood exclusion ordinances to displace crime from a high-crime neighborhood into surrounding areas.

299. Snider, *supra* note 288, at 476.

When a neighborhood exclusion order is issued, the geographic area from which the affected individual is excluded is not necessarily that individual's own neighborhood. If the intention of the ordinance were to punish the excluded individual by depriving him of his community, then the scope of the exclusion would be determined by the individual's place of residence. In contrast, neighborhood exclusion orders attempt to displace crime from high-crime areas primarily by closing the neighborhood off to community *outsiders* who enter the area and commit crimes there. For example, a wealthy suburbanite who leaves her own community to purchase drugs in a high-crime area cannot claim that an exclusion from the high-crime area deprives her of her community. When the affected individual does happen to reside within the zone, she can apply for a variance permitting her to move between essential locations within the zone during the period of the exclusion.<sup>300</sup>

Finally, neighborhood exclusion orders are far less burdensome than traditional banishment. Traditional banishment was permanent and required the individual to leave the country,<sup>301</sup> an entire state, or a large part of a state.<sup>302</sup> Neighborhood exclusion orders, on the other hand, are of a limited duration<sup>303</sup> and apply to only discrete neighborhoods within a city.<sup>304</sup>

In *Johnson v. City of Cincinnati*,<sup>305</sup> the federal district court held that neighborhood exclusion was criminal punishment, likening it to banishment.<sup>306</sup> However, the court's analysis was inconsistent with *Hudson*. For example, the court reasoned that neighborhood exclusion was just as punitive as banishment because it prevented excluded individuals from seeking employment within designated zones during the time of exclusion.<sup>307</sup> However, in *Hudson*, the Court held that an

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300. See *State v. James*, 978 P.2d 415, 419 (Or. Ct. App. 1999); see also Leipold, *supra* note 216, at 491 (arguing that targeted loitering laws do not equate to banishment).

301. See *James*, 978 P.2d at 419.

302. See Snider, *supra* note 288, at 466.

303. See *James*, 978 P.2d at 419.

304. See *id.*

305. 119 F. Supp. 2d 735 (S.D. Ohio 2000), *aff'd on other grounds*, 310 F.3d 484 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2276 (2003).

306. *Id.* at 748. The Sixth Circuit affirmed the district court, but on the grounds that the ordinance violated the plaintiffs' rights to intrastate travel and to association. See *Johnson v. City of Cincinnati*, 310 F.3d 484, 506 n.10 (6th Cir. 2002) (noting that the court need not decide whether neighborhood exclusion constitutes criminal punishment in light of the case's disposition of plaintiffs' other issues), *cert. denied*, 123 S. Ct. 2276 (2003).

307. *Johnson*, 119 F. Supp. 2d at 748.

individual's lifetime disbarment from his chosen profession did not amount to criminal punishment. Even courts adopting a seemingly expansive concept of criminal punishment have distinguished between impairment of employment—which is not criminal punishment under *Hudson*—and restrictions that render an individual entirely unemployable.<sup>308</sup> A temporary exclusion from small geographic areas of a city does not significantly impair employment activities, let alone render the individual unemployable.

#### 5. *Not Excessive in Relation to Civil Purposes*

Finally, the exclusion orders are not excessive in light of the market-disrupting purpose of neighborhood exclusion ordinances.<sup>309</sup> The nature of the exclusions demonstrates that they are intended not to punish the excluded individuals by depriving them of access to the zone, but simply to disrupt their ability to participate in the retail market within the zone. The exclusions are short-term, and even during the period of exclusion, individuals may receive variances to enter the zones for legitimate purposes.

In sum, a short-term neighborhood exclusion order does not appear to constitute criminal punishment under current jurisprudence, at least not when applied in high-crime neighborhoods where exclusion serves non-punitive purposes.<sup>310</sup> Accordingly, neighborhood exclusion ordinances should not be subject to the constitutional jurisprudence governing criminal law and procedure.

#### C. *Recharacterizing Morales*

Although the ordinances are concerned with qualitatively different harms, neighborhood exclusion ordinances and the Chicago anti-gang

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308. See *Doe I v. Otte*, 259 F.3d 979, 988 (9th Cir. 2001), *rev'd sub nom. Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, *reh'g denied*, 123 S. Ct. 1925 (2003). In *Doe I*, the Ninth Circuit struck down Alaska's sex offender registration program, holding that it constituted criminal punishment, in part because the registrants' offender status was easily discoverable by the public and therefore likely to prevent registrants from obtaining employment of any kind. In doing so, the court distinguished this aspect of the program at issue in *Doe I* from the disbarment from a single profession found to be civil in *Hudson*. *Id.* The U.S. Supreme Court subsequently reversed the Ninth Circuit's decision, in part because sex offenders remained free to change employment. *Smith*, 123 S. Ct. at 1151.

309. See *James*, 978 P.2d at 420–21.

310. See *supra* text accompanying notes 283–89 for a discussion of the reasons why neighborhood exclusions should be limited to high-crime areas in order to be considered non-punitive.

loitering ordinance at issue in *Morales* share some fundamental similarities. Both ordinances seek to protect neighborhoods by authorizing police to constrain the movement of individuals seen as disruptive to those neighborhoods.<sup>311</sup> Chicago's ordinance authorized the movement of suspected gang members and those loitering with them, while Portland's ordinance authorizes the exclusion of suspected drug offenders.<sup>312</sup> Moreover, under both ordinances, police orders did not result in arrest and prosecution unless the targeted individual disobeyed the orders by failing to move along or by re-entering a drug free zone, respectively.<sup>313</sup>

Part III.B notes the strong argument that neighborhood exclusion should be treated as a civil restraint. Additionally, at least some of the few lower courts that have addressed that issue have held that neighborhood exclusion does not constitute criminal punishment.<sup>314</sup> From that perspective, the exclusion order is a civil restraint that should be evaluated as such, and the rules governing criminal laws do not come into play until the excluded individual is arrested for criminal trespass for violating the terms of the exclusion order. Applying that model to Chicago's anti-gang loitering ordinance, a police order to disperse from the site of gang-loitering should be evaluated as a civil restraint, while an arrest or prosecution for failing to obey that order should be analyzed under the rules governing the criminal justice system.

Nevertheless, the U.S. Supreme Court was quick to analyze the entirety of Chicago's anti-gang loitering ordinance as a criminal statute.<sup>315</sup> For example, in concluding that it was "clear" that the plaintiffs could bring a facial challenge to the ordinance, the Court stated simply that the ordinance was "a criminal law."<sup>316</sup> The Court provided little analysis to support this conclusion. The city argued that only the "arrest" component of the statute should be scrutinized for vagueness,

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311. See text accompanying *supra* notes 50–53 and 207–16 for a summary of Chicago's anti-gang loitering ordinance and Portland's drug free zone ordinance, respectively.

312. See *City of Chicago v. Morales*, 527 U.S. 41, 47 (1999) (summarizing CHI., ILL., MUNICIPAL CODE § 8-4-015 (2002) and PORTLAND, OR., CITY CODE § 14B.20.030(A)).

313. See *id.* (summarizing CHI., ILL., MUNICIPAL CODE § 8-4-015 (2002) and PORTLAND, OR., CITY CODE § 14B.20.030(A)).

314. *State v. Lhasawa*, 55 P.3d 477, 488 (Or. 2002); *James*, 978 P.2d at 417–21.

315. See Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 184–85 (criticizing the Court's failure in *Morales* to credit Chicago's ordinance for requiring a "move along" order prior to arrest).

316. *Morales*, 527 U.S. at 55 (stating that the ordinance was "a criminal law that contains no *mens rea* requirement," rendering a facial challenge permissible).

and the arrest portion of the ordinance clearly set forth that it was a crime to disobey a dispersal order issued under the ordinance.<sup>317</sup> The majority rejected the city's argument because the ordinance gave insufficient guidance to police officers deciding whether to issue the dispersal orders in the first place.<sup>318</sup> However, the Court failed to explain why it was demanding more particularity to govern the issuance of dispersal orders than would be required generally in any other non-criminal context.<sup>319</sup>

A plurality of Justices at least attempted to articulate a governing principle for determining whether an ordinance should be scrutinized for vagueness, stating that it was the loitering component of the statute that should be scrutinized for vagueness, not just the refusal to obey a dispersal order, because "the loitering is the conduct that the ordinance is designed to prohibit."<sup>320</sup> But, as the dissenting Justices correctly noted, what should matter for purposes of vagueness review "is not what the ordinance is 'designed to prohibit,' but what it actually subjects to criminal penalty."<sup>321</sup> The ultimate objective of a statute cannot be what determines whether it is treated as a criminal law; otherwise, in the special needs context, administrative search provisions aimed at chop shops would be treated as criminal, and drug-testing programs designed to encourage substance abuse treatment would be treated as civil.<sup>322</sup>

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317. *Id.* at 58.

318. *See id.* at 62 (noting that the ordinance's authorization for police officers to arrest only after a dispersal order has been disobeyed "does not provide any guidance to the officer deciding whether such an order should issue").

319. The U.S. Supreme Court is more tolerant of imprecision in civil ordinances than those that impose criminal penalties "because the consequences of imprecision are qualitatively less severe." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982). Similarly, because of the qualitative differences between criminal and civil punishment, the rule of lenity applies only to criminal statutes. *See United States v. Bass*, 404 U.S. 336, 348 (1971) (noting that ambiguous criminal statutes should be construed narrowly "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity") (citations omitted).

320. *See Morales*, 527 U.S. at 58 (Stevens, J., joined by Souter and Ginsburg, JJ.).

321. *Id.* at 90 (Scalia, J., dissenting).

322. *Compare New York v. Burger*, 482 U.S. 691, 717 (1987) (holding that searches of auto parts businesses were "administrative" in nature, even though conducted by police officers for the purpose of reducing car thefts), *with Ferguson v. City of Charleston*, 532 U.S. 67, 83–84 (2000) (holding that searches of pregnant women for evidence of drugs was a traditional criminal search despite ultimate objective of forgoing criminal prosecution if the women entered drug treatment). *See supra* notes 255–59 and 268–75 and accompanying text for further discussion of *Burger* and *Ferguson*.

One could argue that the Court treated Chicago's dispersal orders as criminal in nature because Chicago placed both the authority to issue the orders and the prohibition for violating the orders in the same criminal ordinance. The question of whether a law is criminal turns on legislative intent,<sup>323</sup> and the Chicago City Council included dispersal orders in the same ordinance as a criminal penalty. However, it does not appear that the Court envisioned the ordinance's constitutional flaw as a mere labeling problem. As an initial matter, because the Court wholly omitted any analysis of whether the ordinance was civil or criminal, it certainly did not *state* that it was relying on the inclusion of the authority for the dispersal orders in the same law as a criminal penalty. Moreover, the Court suggested ways in which Chicago might cure the ordinance's flaws,<sup>324</sup> but never suggested it would be so simple as enacting two separate ordinances: a civil provision authorizing police to order loiterers to disperse and a criminal ordinance prohibiting the failure to heed a dispersal order.

The problem in *Morales*, then, appears to have been the lawfulness of the underlying dispersal orders. Although the Court relied on the void for vagueness doctrine to find the dispersal orders unlawful, it did so without articulating a convincing basis for treating dispersal orders as criminal sanctions.<sup>325</sup> Alternatively, the Court could have treated the dispersal orders in *Morales* as civil sanctions, unlike the criminal law that prohibited disobeying the dispersal orders. Had the Court done so, the constitutionality of the dispersal orders could still have been questioned, but the void for vagueness doctrine would not be seen as a

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323. See *supra* notes 221–26 for a summary of the two-prong test of statutory construction that governs whether a law imposes criminal punishment. The first step in the analysis requires the court to ask whether the legislature indicated a preference for either the civil or criminal label in establishing the penalty. *Hudson v. United States*, 522 U.S. 93, 99 (1997).

324. See *Morales*, 527 U.S. at 62 (noting that the ordinance would be lawful if it “only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members”).

325. It is unclear whether the new discretion scholars view dispersal orders as civil or criminal in nature. For example, Debra Livingston argues that some effective public safety efforts could be made by using civil sanctions and injunctions, but then appears to assume that a law requiring police to ask citizens to cease their behavior before issuing a citation is criminal in nature. Livingston, *supra* note 6, at 637 (noting that discretion to enforce criminal prohibitions could be limited by “requiring that people be requested to cease specified behavior before citation or arrest is authorized”). On the other hand, Livingston maintains that cities could treat loitering as “a *civil* infraction for which arrest and prosecution are permissible only when a loiterer refuses to comply with a police request to move along or fails to respond to a citation for civil infraction.” *Id.* at 639 (noting the potential to treat school loitering and loitering with intent to engage in prostitution or in drug distribution in this manner).



threat to new policing approaches, at least those that depart from criminal punishment. In other words, legislatures would be permitted to entrust police with discretion as long as that discretion did not include decisions about whom to arrest on criminal charges.

By relying improperly on the void for vagueness doctrine, the Court permitted itself to avoid deciding the difficult issues that would have been presented if the Court had evaluated Chicago's anti-gang loitering ordinance as a civil sanction. For example, unlike the neighborhood exclusion orders issued under drug free zone ordinances, the orders to disperse authorized by Chicago's anti-gang loitering ordinance were delivered orally and informally and could not be challenged.<sup>326</sup> Under a due process inquiry, the Court would have had to balance the nature of the private interest involved, the risk of erroneous deprivation of such an interest given the nature of the procedure used, and the nature of the governmental interest involved.<sup>327</sup>

Moreover, the Court would have had to determine whether laws affecting an individual's freedom of movement in public places implicate a protected constitutional right to travel or, more apt in *Morales*, a right *not* to travel (i.e., to loiter). Laws that implicate fundamental rights are subject to strict judicial scrutiny.<sup>328</sup> Moreover,

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326. Cf. PORTLAND, OR., CITY CODE § 14B.20.010-.060 (2002) (setting forth procedures for appealing neighborhood exclusion order under Portland's drug free zone ordinance); see also *State v. Johnson*, 988 P.2d 913, 915 (Or. Ct. App. 1999) (holding that Portland's drug free zone ordinance procedures did not deprive the defendant of due process, even though the exclusion notice did not explain that an appeal of the order would stay the order, because the notice explained the right to appeal and process for appealing); *State v. James*, 978 P.2d 415, 421 (Or. Ct. App. 1999) (upholding drug free zone ordinance against due process challenge because "[i]t is difficult to imagine a greater procedural protection than a predeprivation hearing").

327. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Laurence Tribe has also noted the difficulty of identifying the right protected by the Court in *Morales*. To Tribe, the Court's ruling could not have been a matter of procedural due process, because procedural concerns would have been implicated only if the individual was denied an adequate hearing on the factual issue of whether he had disobeyed a dispersal order. Laurence H. Tribe, *Comment, Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 192 (1999). His analysis gives short shrift to the argument that the problem was the absence of any adequate procedural protections concerning the factual issue of whether the individual should have been the subject of a dispersal order for loitering.

328. Laws implicating a fundamental liberty are subject to strict scrutiny. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992) (finding unconstitutional a state statute that required women to notify their husbands before having an abortion, except in limited circumstances); *Moore v. City of E. Cleveland*, 431 U.S. 494, 500 (1977) (invalidating zoning ordinance limiting occupancy to members of a single "family," defined narrowly); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (striking down a state statute that made it illegal to use or counsel others to use contraceptives); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (declaring state statute authorizing

courts are less tolerant of vagueness in laws—civil or criminal—that might restrain constitutionally protected activities.<sup>329</sup> Accordingly, if the Court had found a fundamental right to loiter in *Morales*, it could have struck down the law without suggesting that a dispersal order constitutes a criminal sanction.

Lower courts are divided over the issue of whether the constitutional right to travel protects a freedom of movement intrastate.<sup>330</sup> To date, the U.S. Supreme Court’s jurisprudence regarding the right to travel has been limited to cases involving interstate travel.<sup>331</sup> The Court has never recognized a right to travel within a state,<sup>332</sup> and the nature of the interstate right to travel suggests that the right might not be implicated by restrictions on intrastate travel.<sup>333</sup>

Although the Court bypassed the opportunity to make a clear pronouncement in *Morales* regarding the existence of a fundamental right *not* to travel, the myriad of opinions in that case suggests that a majority of the Court would permit cities to restrict individuals’ freedom

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sterilization of “habitual” criminals to be unconstitutional).

329. See *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (noting that “perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights”).

330. Compare *Johnson v. City of Cincinnati*, 310 F.3d 484, 495–98 (6th Cir. 2002) (recognizing a constitutional right to “travel locally through public spaces and roadways”), *cert. denied*, 123 S. Ct. 2276 (2003), *Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (recognizing a “fundamental right of free movement”), and *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990) (recognizing substantive due process right to “move freely about one’s neighborhood or town”), with *Hutchins v. District of Columbia*, 188 F.3d 531, 538 (D.C. Cir. 1999) (expressing doubt that substantive due process extends to a general right of free movement), *Wright v. City of Jackson*, 506 F.2d 900, 902–03 (5th Cir. 1975) (rejecting a fundamental right to intrastate travel), and *Eldridge v. Bouchard*, 645 F. Supp. 749, 753–54 (W.D. Va. 1986) (refusing to recognize a fundamental right to intrastate travel), *aff’d without opinion*, 823 F.2d 546 (4th Cir. 1987).

331. See *Saenz v. Roe*, 526 U.S. 489, 500 (1999); *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969).

332. The Court has previously declined to consider whether to distinguish between interstate and intrastate travel. *Mem. Hosp. v. Maricopa County*, 415 U.S. 250, 255–56 (1974).

333. The right to travel freely between states arises from the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution and the Privileges or Immunities Clause of the Fourteenth Amendment. See *Saenz*, 526 U.S. at 500–04. Article IV’s Privileges and Immunities Clause restrains state efforts to deny out-of-staters access to local resources. See, e.g., *Zobel v. Williams*, 457 U.S. 55, 59 n.5 (1982) (holding that the Privileges and Immunities Clause “‘was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy’”) (quoting *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)). The Fourteenth Amendment’s Privileges or Immunities Clause protects only those rights of citizenship that owe their existence to the federal government, its character, or its laws, not unenumerated rights. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872).

of intrastate movement. Although six Justices voted in *Morales* to strike down Chicago's anti-gang loitering ordinance on vagueness grounds,<sup>334</sup> the defendants in *Morales* failed to gain the support of a majority of the Court for their argument that the Chicago ordinance violated a constitutional right to loiter. Only three members of the Court were prepared to recognize a fundamental "freedom to loiter for innocent purposes."<sup>335</sup> Three dissenting Justices made clear their rejection of such a right.<sup>336</sup>

While the three concurring Justices did not expressly address the issue of a right to loiter, Justice O'Connor's concurring opinion, in which Justice Breyer joined, suggests at least two additional votes against a fundamental right to loiter.<sup>337</sup> While O'Connor and Breyer purported to "express no opinion about" issues other than the ordinance's vagueness, they made a point of noting that "there remain open to Chicago reasonable alternatives to combat the very real threat posed by gang intimidation and violence."<sup>338</sup> Specifically, the Justices indicated that an anti-loitering ordinance would pass muster if it targeted only gang members or applied only in specific geographic areas.<sup>339</sup> If such ordinances would be lawful, then either there is no fundamental right to loiter, or this supposed right to "loiter for innocent purposes" is an entirely different kind of fundamental right than those that trigger the strictest judicial scrutiny under substantive due process<sup>340</sup> or equal protection<sup>341</sup> jurisprudence. Indeed, even the Justices who supposedly

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334. *City of Chicago v. Morales*, 527 U.S. 41, 60–64 (1999) (six-member opinion of the Court, holding that anti-gang loitering ordinance entrusted too much discretion to police officers to determine which types of loitering "purposes" were lawful).

335. *Id.* at 53 (Stevens, J., with Souter and Ginsburg, JJ., joining).

336. *See id.* at 102–06 (Thomas, J., dissenting, with Rehnquist and Scalia, JJ., joining).

337. *See id.* at 64–69 (O'Connor, J., concurring in part, with Breyer, J., joining).

338. *Id.* at 67.

339. *Id.*

340. To pass strict scrutiny, a law must be necessary to the accomplishment of a compelling government interest. *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984); *see Moore v. City of E. Cleveland*, 431 U.S. 494, 499–500 (1977) (invalidating zoning ordinance limiting occupancy to members of a single "family," defined narrowly); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (invalidating state law prohibiting contraception); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (subjecting state law mandating sterilization of some felons to strict scrutiny under due process analysis).

341. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (striking down poll tax as a violation of equal protection, in part because it implicated the "political franchise of voting"); *Griffin v. Illinois*, 351 U.S. 12, 19–20 (1956) (holding that state law requiring appellants to provide a trial transcript at their own expense violated rights to equal protection by denying indigent

recognized a constitutional right to loiter did not appear to give this right the same weight as those previously recognized as fundamental, suggesting that the right could be limited by narrower—but nevertheless quite restrictive—ordinances.<sup>342</sup>

The goal of this Article is not to answer the ultimate question of whether Chicago's anti-gang loitering ordinance would pass constitutional muster if analyzed as a civil statute. Rather, the Article recasts the dispersal orders authorized by the ordinance as civil restraints for the purpose of demonstrating that the Court could have preserved a judicial role in scrutinizing the dispersal orders without insisting inappropriately on a level of legislative clarity typically reserved for criminal statutes and laws that implicate fundamental constitutional rights.

#### *D. Applying the Programmatic Purpose Approach*

The political process theory offered by Kahan and Meares and my recommended programmatic purpose approach sometimes will lead to the same result, albeit for different reasons. For example, Kahan and Meares attribute the government's ability to erect sobriety checkpoints<sup>343</sup> and to search individuals at airports<sup>344</sup> and in government buildings<sup>345</sup> to the fact that these searches burden average members of the community.<sup>346</sup> However, the evenhanded application of the searches is

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defendants access to state courts).

342. See *Morales*, 527 U.S. at 62 (noting that the ordinance would be lawful if it applied only to loitering with an apparently harmful purpose or effect, "or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members").

343. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding brief, suspicionless seizures of motorists at sobriety checkpoints aimed at removing drunk drivers from the road); see also *Delaware v. Prouse*, 440 U.S. 648, 657 (1979) (suggesting that roadblocks could be used to verify drivers' licenses and vehicle registrations).

344. *United States v. Edwards*, 498 F.2d 496, 498 (2d Cir. 1974) (upholding airport security checkpoints as reasonable by balancing individual liberty interests against government's interest in preventing hijacking); *United States v. Davis*, 482 F.2d 893, 908–12 (9th Cir. 1973) (analyzing search at airport screening checkpoint as an administrative search); *United States v. Moreno*, 475 F.2d 44, 48–49 (5th Cir. 1973) (noting that most airport searches are justified by the exigent circumstances presented by the need for on-flight safety).

345. See *United States v. Bulacan*, 156 F.3d 963, 967–73 (9th Cir. 1998) (recognizing that searches of people entering government buildings can be justified if limited in scope to fulfill the government's legitimate need to discover weapons and explosives); *Downing v. Kunzig*, 454 F.2d 1230, 1232–33 (6th Cir. 1972) (upholding search at government building as reasonable in light of government's interest in protecting federal employees and property).

346. See Kahan & Meares, *supra* note 39, at 1172–73; see also Meares & Kahan, *supra* note 115,

just one factor in determining its programmatic purpose. Another critical factor in all of these examples is the close connection between the government action and an interest other than traditional criminal investigation. For example, searches occur at the entrances of government buildings and airport terminals to ensure that no one enters with weapons or explosives, not for the primary purpose of discovering evidence to be used in a criminal prosecution.<sup>347</sup> Similarly, stopping motorists on roadways is a way to ensure that drivers are sober and licensed.<sup>348</sup> In contrast, a roadblock erected simply to determine whether any cars contain evidence of a crime does not serve any government objective other than traditional criminal investigation.<sup>349</sup> Therefore, under the programmatic purpose theory, the roadblock would be subject to normal Fourth Amendment requirements.<sup>350</sup> Under Kahan and Meares's political process approach, such a roadblock would presumably be permissible as long as it burdens average members of the community.

Similarly, consider Kahan and Meares's approval of the Chicago Housing Authority's (CHA) building search policy.<sup>351</sup> Under the policy, CHA police were permitted to authorize warrantless sweeps of the homes of residents of Housing Authority developments under certain circumstances, including to locate weapons after shooting incidents.<sup>352</sup>

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at 255 (explaining that roadblocks and searches at airports and government buildings are best explained under their political process theory because "insofar as these policies *do* burden average members of the community, there is much less reason for courts to doubt the determination of politically accountable officials that these policies strike a fair balance between liberty and order").

347. See *Bulacan*, 156 F.3d at 967-73 (holding search for drugs at the entrance of a federal building to be outside the lawful scope of an administrative search justified by the government's interest in locating weapons and explosives and not by a general interest in finding evidence of criminal activity).

348. See *supra* note 343.

349. *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (holding that a roadblock erected to facilitate drug interdiction did not advance a special need and was "primarily for the ordinary enterprise of investigating crimes").

350. This is the current approach under the U.S. Supreme Court's jurisprudence. *Id.*

351. See *Pratt v. Chi. Hous. Auth.*, 155 F.R.D. 177 (N.D. Ill. 1994) (lawsuit challenging constitutionality of Chicago Housing Authority's search policy).

352. Under the policy, Chicago Housing Authority police were permitted to conduct warrantless searches of the homes of residents of Housing Authority developments under certain circumstances. *Id.* at 178. The requisite preconditions included "random gunfire from building to building and/or intimidation at gunpoint or by shooting if weapons were taken into buildings." *Id.* If the police could not determine into which apartment the weapons were taken, the policy authorized extensive "sweeps" of all residential apartment units in the building, which included looking in closets and drawers and searching residents' personal effects. *Id.*

Applying their political process approach, Kahan and Meares argue that the CHA building search policy should be upheld because the burden of unannounced searches fell on everyone in the projects, not just on persons suspected of wrongdoing, and because their representatives had approved the policy.<sup>353</sup> Under the programmatic purpose approach, in contrast, the central inquiry is whether the policy advances a purpose other than ferreting out evidence of criminal activity to be used in criminal proceedings. For example, if the government used evidence discovered during the searches against tenants in criminal prosecutions, but did nothing with respect to their tenancy, the searches would appear to promote traditional criminal investigation and prosecution. If, on the other hand, evidence from the searches was used to support eviction from public housing, the searches would appear designed to ensure that housing units were given to tenants who were not engaged in criminal activity on the property.<sup>354</sup> The fact that the CHA searches were triggered by individual occurrences of crime suggests a primary motive to gather evidence to support an arrest and prosecution, not a “special need” to maintain the safety of the developments on an ongoing basis.

Unlike the political process theory, the programmatic purpose approach would permit cities to implement strategies requiring police discretion, as long as those strategies avoided traditional criminal investigation, prosecution, and punishment. The discussion of Portland’s

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353. See Kahan & Meares, *supra* note 39, at 1175. See *supra* notes 183–84 and accompanying text for further discussion of Kahan and Meares’s analysis of the CHA building search policy.

354. The heart of the special needs exception to the Fourth Amendment’s warrant and probable cause requirements is the government’s need to conduct searches for purposes *other* than simply discovering evidence of a crime. See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002) (upholding as reasonable drug testing of students to ensure that drug-affected students were not involved in extracurricular activities); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 658 (1995) (upholding suspicionless drug tests of student athletes partly because the results of the tests were not turned over to law enforcement authorities); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) (upholding suspicionless drug testing of certain sensitive Customs Agents partly because it was “clear that the . . . program [was] not designed to serve the ordinary needs of law enforcement”); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 621 n.5 (1989) (upholding a suspicionless drug testing scheme aimed at railroad employees because it was not designed as a pretext to gather evidence for law enforcement purposes); *O’Connor v. Ortega*, 480 U.S. 709, 721–21 (1987) (suggesting that Fourth Amendment’s warrant requirement should not apply when the government searches its employees’ workspace for evidence of work-related misconduct); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 n.7 (1985) (upholding a warrantless search on school grounds when justified by “special needs” and not conducted for the advancement of law enforcement). The strongest argument to support searches in public housing projects is that the searches are necessary to ensure that the government allocates scarce subsidized housing to those who do not use it for criminal purposes. Cf. *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 135 (2002) (upholding policy permitting evictions from public housing for criminal activity).

drug free zones in Part III.B demonstrates one way a civil regime can enable government to exercise control over public spaces.<sup>355</sup> Current restrictions on access to public housing properties present similar civil consequences.<sup>356</sup> While the programmatic purpose approach would permit many such civil sanctions, it would not permit vague *criminal* laws. This approach has several advantages. First, it preserves the important value of notice to the citizenry regarding the scope of criminal prohibitions.<sup>357</sup> It recognizes that, even for low-level criminal offenses, a criminal sanction is qualitatively different from civil penalties because it reflects society's moral condemnation.<sup>358</sup> Accordingly, criminal punishment should not be imposed unless the defendant had at least a fair opportunity to know that his conduct was criminal.

Second, the programmatic purpose approach will give municipalities an incentive to avoid using criminal laws to regulate disorder. If forced to resort to non-criminal laws to permit discretionary responses to disorder, cities might develop more effective, flexible approaches rather than outright prohibitions.<sup>359</sup> Moreover, civil responses to disorder permit cities to address the concerns of communities without imposing

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355. This approach is not unique to American cities. For example, in the United Kingdom, the Football Spectators Act authorizes "banning orders" that prohibit individuals who engage in banned activities at football matches from attending future games. See Football (Disorder) Act, 2000, c. 25 (Eng.).

356. See, e.g., *Virginia v. Hicks*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 2191, 2198–99 (2003) (holding that housing authority's trespass policy was not facially invalid under the First Amendment's overbreadth doctrine); *Rucker*, 535 U.S. at 135 (upholding public housing policy authorizing evictions for drug activity). But see *Nora V. Demleitner*, "Collateral Damage": No Re-Entry for Drug Offenders, 47 VILL. L. REV. 1027, 1049–53 (2002) (calling for the abolition of many civil collateral consequences to criminal activity).

357. See *supra* Part II.D for a discussion of the importance of forcing legislatures to define clearly the scope of criminal laws.

358. See *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982) (noting that vagueness is more permissible in civil ordinances than in criminal laws "because the consequences of imprecision are qualitatively less severe"); *United States v. Bass*, 404 U.S. 336, 348 (1971) (discussing the rule of lenity and noting that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity") (citations omitted).

359. See *Livingston*, *supra* note 6, at 638 ("Civil sanctions, moreover, are generally preferable to penal sanctions when the community wishes to reduce the level of an activity—to regulate it—but not prohibit the activity entirely."); see also John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1887–92 (1992) (encouraging use of civil sanctions to respond to conduct that is not egregious). For example, under Ellickson's zoning model, disfavored activities are not criminalized, but are treated as "nonconforming uses" if committed within orderly zones of the city. See Ellickson, *supra* note 14, at 1232–39.

the often ignored costs of enlarging the scope of criminal liability. After all, the purported goal of new policing efforts is not to penalize violators of norms, but to “negotiate compliance on the streets.”<sup>360</sup> Civil responses to disorder, for example, avoid stigmatizing the disorderly with arrest and convictions for offenses that do not meet the traditional requirements of criminal law.<sup>361</sup> Bernard Harcourt has set forth the hidden costs of order-maintenance policing, including the reinforcement of stereotypes about black criminality and increased tensions between at least some African-American residents and the police due to the proliferation of arrests for low-level offenses.<sup>362</sup> The programmatic purpose approach would also help ensure that new policing efforts were not used as a pretext to engage in old-fashioned searches for evidence.<sup>363</sup>

The programmatic purpose approach also avoids the pitfalls of giving malleable notions of community support and involvement constitutional significance.<sup>364</sup> Under the programmatic purpose approach, political majorities (or handfuls of citizens purporting to represent majorities) are not permitted to waive the constitutional rights of the entire community. Accordingly, there is no risk that rights will be lost because the relevant community is defined improperly, because the community’s level of support was assessed inaccurately, or because the community supported a police program only because it had no other realistic alternatives.

Most importantly, the programmatic purpose approach would require courts to scrutinize new policing efforts on their individual merits. Applying the void for vagueness doctrine to *any* police action that might ultimately form the basis of a criminal arrest and prosecution, as the Court appeared to do in *Morales*, casts too wide a net over prohibited delegations of discretion. On the other hand, the new discretion scholars are too quick to conclude that courts should permit police discretion, even with respect to traditional criminal law efforts. The programmatic purpose approach, in contrast, would require courts to engage in the fact-

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360. Livingston, *supra* note 6, at 638.

361. *Id.* (noting that civil sanctions can be sufficient to handle community problems without bearing “the hallmarks of blameworthiness associated with criminal law”).

362. HARCOURT, *supra* note 29, at 166–79, 213.

363. See *supra* notes 118–26 and accompanying text for a discussion of how police could use new policing models as a pretext to search for evidence of more serious crimes.

364. See *supra* Part II.A–B, E for discussions criticizing the new discretion scholars’ reliance on community sentiment.



specific, “contextual” inquiry sought by new discretion scholars,<sup>365</sup> without giving up the void for vagueness doctrine entirely.

A fact-specific inquiry would be required at two levels. First, courts would need to decide whether a challenged police program served the traditional functions of criminal law or whether it was qualitatively different. For example, Part III.B of this Article argues that neighborhood exclusion orders issued pursuant to drug free zone ordinances do not constitute criminal punishment. However, the classification of neighborhood exclusion as different from traditional criminal procedure does not turn solely on majority support for the exclusions, as it would under the political process model. Indeed, classification of neighborhood exclusion as a civil restraint does not even turn solely on the nature of the imposed burden. Rather, that classification depends on the limited scope and duration of the restraint, the availability of variances, and, importantly, the extent of the existing problem within the zones.<sup>366</sup>

If, after scrutinizing the parameters of a specific program and the needs of the jurisdiction where it applies, a court determines that the program amounts to traditional criminal law, then the court should evaluate it as such by applying the rules that govern traditional criminal law programs. For example, searches conducted as part of a traditional criminal investigation should generally be conducted pursuant to a warrant based on probable cause.<sup>367</sup> Similarly, substantive criminal prohibitions should be subject to the void for vagueness doctrine.

If, however, a court determines that the challenged program does not promote the traditional aims of criminal law, the court should evaluate the program as a civil restraint. In the civil context, the warrant and probable cause requirements may not apply to searches,<sup>368</sup> and the void for vagueness doctrine does not apply as rigidly to substantive provisions.<sup>369</sup> On the other hand, weighing the constitutionality of a non-criminal restraint requires the court to determine whether the civil program implicated a fundamental right.<sup>370</sup> The court must then weigh

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365. See Livingston, *supra* note 6, at 635.

366. See *supra* text accompanying notes 284–89 for a discussion of drug free zone ordinances and the importance that they apply only to neighborhoods plagued by more than their proportional share of criminal activity.

367. See *supra* note 270.

368. See *supra* notes 255–59, 268–74 and accompanying text.

369. See *supra* note 319.

370. See *supra* notes 326–29 and accompanying text for a discussion of how improper judicial

the government interest served by the restraint and the degree to which the restraint serves that interest against the individual liberty interests at stake.<sup>371</sup> In this respect, judicial evaluation of the program as a non-criminal restraint provides a second opportunity to engage in a contextualized review of the program. For example, in determining that a Cincinnati neighborhood exclusion ordinance violated due process, the Sixth Circuit refused to consider evidence demonstrating the ordinance's effectiveness in Portland, suggesting that judicial inquiry should focus on whether a particular program sufficiently advances the government's interest in a *particular location*.<sup>372</sup>

#### IV. CONCLUSION

Early scholarship focusing on the new policing broke ground by recognizing the importance of protecting not just the individual liberties of offenders brought into the criminal justice system, but also the interests of communities struggling to gain minimum controls over their neighborhoods—controls that more privileged communities take for granted. The new discretion scholars have argued that new policing approaches should be subject to less stringent judicial scrutiny than typical law enforcement efforts. To distinguish the new from the traditional, they have relied on claimed inner-city support for new policing approaches and on a political process theory in which inner-city communities should be permitted to exchange traditional liberty for safety, as long as they do so evenhandedly.<sup>373</sup>

However, in their attempt to empower inner-city neighborhoods to establish necessary controls, the new discretion scholars have been too quick to discard constitutional rules that preserve and respect critical distinctions between criminal and non-criminal programs. This Article

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reliance on the void for vagueness doctrine permits courts to avoid determining whether a law implicates a fundamental right.

371. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

372. *Johnson v. City of Cincinnati*, 310 F.3d 484, 504 (6th Cir. 2002) (suggesting that it may not be appropriate to extrapolate “that what worked in Portland would likely work in [the targeted Cincinnati zone]”), *cert. denied*, 123 S. Ct. 2276 (2003). The *Johnson* court refused to consider empirical evidence relating to the Portland ordinance also because the court subjected the ordinance to strict scrutiny. Because the court recognized a fundamental right to intrastate movement, it was concerned not only with the degree to which the ordinance advanced the government's interest, but also whether the government could advance its purposes with less restrictive means. *Id.* As set forth in *supra* notes 330–42 and accompanying text, there are reasons to believe that the U.S. Supreme Court would not recognize a constitutional right to loiter.

373. See *supra* Part I.C for a discussion of the new discretion scholarship.

has argued that the balance between traditional civil liberties and the need for urban crime control would be better struck if cities were forced to choose either nontraditional responses to public safety problems or to be scrutinized under the traditional rules governing criminal law and procedure. To separate “new” public safety responses from the traditional, this Article encourages scrutiny of the challenged response’s programmatic purpose to determine whether it serves the traditional purposes of criminal law.